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Bringing the Vice President into the Fold: Executive Immunity and the Vice Presidency

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BRINGING THE VICE PRESIDENT INTO THE FOLD: EXECUTIVE IMMUNITY AND THE VICE PRESIDENCY

Abstract: The vice presidency of Dick Cheney from 2000 to 2008 raised complicated questions about the constitutional and legal position of the Vice President, including the Vice President's amenability to civil suits for damages. The U.S. Supreme Court's executive immunity jurisprudence has established that the President can claim absolute immunity for official acts, while cabinet members and presidential aides can assert only qualified immunity. No court has ever determined if the Vice President should be granted absolute or qualified immunity in civil suits for damages. Acknowledging that the vice presidency is an increasingly important political office, this Note argues that neither the Vice President's constitutional status nor his specific functions justify a grant of absolute immunity. This Note asserts that although the Vice President could claim some limited form of legislative immunity, qualified immunity is the appropriate standard in most suits for damages. This Note contends that qualified immunity for the Vice President would both preserve the effective functioning of the executive branch and ensure that the Vice President is legally accountable for an abuse of power.

INTRODUCTION

On July 13, 2006, Joe Wilson and Valerie Plame filed a civil suit in the U.S. District Court for the District of Columbia against Vice President Dick Cheney and other members of the Bush Administration, alleging that Cheney had violated their constitutional rights by disclosing Plame's covert status as a member of the Central Intelligence Agency.[1] Claiming that Vice President Cheney had divulged Plame's identity to the press in retaliation for Wilson's outspoken criticism of President George W. Bush, Wilson and Plame brought a *Bivens* action against the

[1] Complaint at 1–4, Wilson v. Libby, 498 F. Supp. 2d 74 (D.D.C. 2007) (No. 06-1258), *aff'd* 535 F.3d 697 (D.C. Cir. 2008); *see* Eric M. Weiss & Charles Lane, *Vice President Sued by Plame and Husband*, WASH. POST, July 14, 2006, at A03. Wilson and Plame also filed suit against presidential advisor Karl Rove, vice presidential aide I. Lewis "Scooter" Libby, and Deputy Secretary of State Richard Armitage. *See* Amended Complaint at 4–5, *Wilson*, 498 F. Supp. 2d 74 (No. 06-1258).

Vice President in his individual capacity.[2] In seeking dismissal of the suit, Cheney argued that the Vice President is absolutely immune from civil suits seeking damages.[3] The district court dismissed the lawsuit on *Bivens* grounds, explicitly noting that it had not considered the Vice President's claim for immunity in its decision.[4] On February 5, 2008, Wilson and Plame appealed to the U.S. Court of Appeals for the District of Columbia Circuit.[5] Vice President Cheney again asserted that the Vice President was absolutely immune from civil suits seeking damages, while Wilson's and Plame's attorney, Erwin Chemerinsky, argued that no case had ever accorded the Vice President absolute immunity.[6] On August 12, 2008, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the case, but again explicitly refused to consider Vice President Cheney's claims for absolute immunity.[7] The unwillingness of both the U.S. District Court and the U.S. Court of Appeals for the District of Columbia Circuit to consider whether the Vice President should be granted absolute immunity in civil suits for damages leaves this question unanswered.[8]

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[2] *See Wilson*, 498 F. Supp. 2d at 82. The Supreme Court recognized an implied cause of action to recover money damages from federal officials for violating an individual's constitutional rights in 1971 in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. 403 U.S. 388, 397 (1971). Under *Bivens*, an individual has a federal cause of action to recover money damages from federal officials for violating an individual's constitutional rights. *See id.* These suits are known as "*Bivens* actions," and are essentially parallel causes of action to § 1983 suits against state officials. *See* Alan Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261, 269–71 (1995); A. Allise Burris, Note, *Qualifying Immunity in Section 1983 & Bivens Actions*, 71 Tex. L. Rev. 123, 124–40 (1992) (criticizing the Supreme Court's willingness to grant governmental immunity in view of the language, legislative history, and purpose of § 1983).

[3] *See* Memorandum of Points and Authorities in Support of Defendant Vice President of the United States Richard B. Cheney's Motion to Dismiss at 18–23, *Wilson*, 498 F. Supp. 2d 74 (No. 06-1258).

[4] *See Wilson*, 498 F. Supp. 2d at 77–78, 96 ("[T]here is no need to address defendants' alternative arguments for dismissal of these claims, including their assertions of qualified immunity and the Vice President's claim of absolute immunity."). For an analysis critical of the district court's denial of a *Bivens* remedy in the case, see Scott R. Daniel, Note, *The Spy Who Sued the King: Scaling the Fortress of Executive Immunity for Constitutional Torts in* Wilson v. Libby, 16 Am. U. J. Gender Soc. Pol'y & L. 503, 511–26 (2008).

[5] *See* Brief of Appellants, Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008) (No. 07-5257), *petition for cert. filed*, 77 U.S.L.W. 3506 (U.S. Feb. 17, 2009) (No. 08-1043).

[6] *See* Brief of Appellee Vice President Richard B. Cheney at 4–8, *Wilson*, 535 F.3d 697 (No. 07-5257); Reply Brief of Appellants at 15, *Wilson*, 535 F.3d 697 (No. 07-5257).

[7] *Wilson*, 535 F.3d at 713 n.3 ("Because our decision, based on the grounds considered by the district court, results in the dismissal of all claims against the Vice President of the United States, we need not, and do not, consider his alternate claim for absolute Vice-Presidential immunity.").

[8] *See id.*; Reply Brief of Appellants, *supra* note 6, at 15. The issue of the Vice President's personal liability for money damages has been virtually neglected in the scholarly litera-

Like the Vice President's claims for immunity, the larger issue of executive immunity raises complicated questions about power, legitimacy, and the rule of law.[9] Not surprisingly, concern over the scope and meaning of executive immunity—much like executive privilege—has been most acute when the executive branch has aggressively championed an expansive view of executive power.[10] The presidency of George W. Bush produced its fair share of controversy regarding executive power, but his administration arguably went farther than any previous administration in its assertion of executive authority and in the sweeping powers it delegated to the Vice President.[11] Given the very real possibility of additional civil suits against Vice President Dick Cheney and the fact that power has increasingly become institutionalized in the office of the Vice President itself, it is important and timely to ask what level of immunity the Vice President should be able to claim in civil suits for money damages.[12] Distinct from and inferior to the presidency, but still having its own unique constitutional status, the vice presidency appears to be a political and constitutional office without a clear home in the Court's executive immunity jurisprudence.[13]

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ture. *See* Lyman G. Bullard, Jr., Note, *Absolute Presidential Immunity from Civil Damage Liability:* Nixon v. Fitzgerald, 24 B.C. L. REV. 737, 768 (1983) (stating briefly that the Vice President would likely be unsuccessful in claiming absolute immunity under the standard in *Nixon v. Fitzgerald*); Jennifer L. Long, Note, *How to Sue the President: A Proposal for Legislation Establishing the Extent of Presidential Immunity*, 30 VAL. U. L. REV. 283, 321–32 (1995) (asserting that because the Vice President is dependent on the President and may assume the presidency at any point, the Vice President should be granted absolute immunity).

[9] *See* Erwin Chemerinksy, *Justice Delayed Is Justice Denied*, NEXUS, Spring 1997, at 24, 27–28.

[10] *See* Clinton v. Jones, 520 U.S. 681 (1997); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 496–97 (2007); Jonathan K. Geldert, Note, *Presidential Advisors and Their Most Unpresidential Activities: Why Executive Privilege Cannot Shield White House Information in the U.S. Attorney Firings Controversy*, 49 B.C. L. REV. 823, 823–24 (2008).

[11] *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 71–98 (2007) (illustrating how the Office of Legal Counsel contended with the Bush administration's expansive notions of executive power and concerns over terrorism in the wake of the 9/11 attacks); Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRESIDENTIAL STUD. Q. 374, 384 (2008).

[12] *See* Complaint at 1–5, Jewel v. Nat'l Sec. Agency, No. 08-4373 (N.D. Cal. filed Sept. 18, 2008). On September 18, 2008, the Electronic Frontier Foundation filed a civil suit on behalf of AT&T customers against the National Security Agency ("NSA") and various officials within the Bush administration, including Vice President Dick Cheney. *See id.* Asserting that the NSA's surveillance program violated their constitutional rights, the plaintiffs sued Vice President Cheney in his official and individual capacities, seeking money damages from Cheney for his role in the development of the surveillance program. *See id.* at 5; *see also id.* at 19, 22, 27, 33, 41, 47.

[13] *See supra* note 8 and accompanying text.

This Note examines the Vice President's changing historical, constitutional, and legal office and its orientation within the executive branch.[14] In addition, this Note analyzes the current executive immunity jurisprudence in an effort to better understand the unique nature of absolute presidential immunity and the constitutional and functional differences that distinguish the President from the Vice President.[15] This Note argues that under the Court's functional approach to immunity decisions, neither the Vice President's constitutional status nor his specific functions merit a grant of absolute immunity.[16] Although the Vice President might be able to claim some limited form of legislative, rather than executive, immunity, it appears that in almost all civil suits for damages, qualified immunity is the appropriate standard.[17]

Part I of this Note examines the historical and constitutional ambivalence surrounding the vice presidency, touching on the recent efforts of Vice President Cheney to position the vice presidency outside of the executive branch.[18] Part II surveys the Court's executive immunity jurisprudence to clarify the relevant principles in evaluating the Vice President's claim for absolute immunity.[19] Part III briefly reviews the historical precedent of subjecting the Vice President to criminal liability.[20] Part IV evaluates and applies these considerations to the vice presidency and concludes that the Vice President's claim for absolute immunity in civil suits for damages should fail in almost every instance.[21]

I. The Vice President's Amorphous Office Under the Constitution

Although the Vice President is generally understood to be part of the executive branch, the vice presidency is, in fact, a complex and imperfect constitutional and political office.[22] In discussing the constitu-

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[14] *See infra* notes 22–103 and accompanying text.

[15] *See infra* notes 104–195 and accompanying text.

[16] *See infra* notes 226–303 and accompanying text.

[17] *See infra* notes 304–318 and accompanying text.

[18] *See infra* notes 22–103 and accompanying text.

[19] *See infra* notes 104–195 and accompanying text.

[20] *See infra* notes 196–225 and accompanying text.

[21] *See infra* notes 226–318 and accompanying text.

[22] *See* Joel K. Goldstein, The Modern American Vice Presidency 309 (1982); Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 Mich. L. Rev. 1703, 1705–12 (1988); Todd Garvey, Note, *A Constitutional Anomaly: Safeguarding Confidential National Security Information Within the Enigma That Is the American Vice Presidency*, 17 Wm. & Mary Bill Rts. J. 565, 569 (2008).

tional complexities of the vice presidency, one scholar remarked: "There are many good things in the Constitution, but the vice-presidency isn't one of them."[23] Part of the uncertainty surrounding the vice presidency stems from the limited attention given to it by the drafters of the Constitution.[24] The significant political and constitutional changes to the office in the twentieth century have also complicated our understanding of the once maligned position because the Vice President has become an increasingly powerful figure in the executive branch.[25] Although Vice President Dick Cheney's recent claims that the Vice President might be part of the legislative branch, or even part of no branch of government at all, have elicited bewilderment,[26] Cheney's claims reflect the reality that the constitutional and political status of the Vice President is still somewhat amorphous.[27]

A. *Defining and Debating the Constitutional Position of the Vice Presidency*

From the vice presidency's very beginnings, there has been controversy as to how the office should be properly characterized and exercised under the Constitution.[28] Many anti-Federalists and even some convention delegates considered the Vice President's proximity to the executive branch and position as President of the Senate threatening to the separation of powers doctrine.[29] Vice President Thomas Jefferson noted: "I consider my office as constitutionally confined to legislative

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[23] Friedman, *supra* note 22, at 1703.

[24] *See* Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 510 (1995). One commentator has described the vice presidency as an "afterthought." *Id.* For an overview of the Vice President's persistent weakness in the nineteenth and early twentieth centuries, see Richard Albert, *The Evolving Vice Presidency*, 78 TEMP. L. REV. 811, 815–31, 837–42 (2005).

[25] *See* Goldstein, *supra* note 24, at 508; *infra* notes 45–51 and accompanying text.

[26] *See* Scott Shane, *Agency Is Target in Cheney Fight on Secrecy Data*, N.Y. TIMES, June 22, 2007, at A1.

[27] *See* Glenn Harlan Reynolds, Essay, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. 1539, 1543 (2008) (suggesting that Congress could attempt to prohibit the Vice President from exercising executive powers as a means to address the Vice President's uncertain constitutional status); Aryn Subhawong, Comment, *A Realistic Look at the Vice Presidency: Why Dick Cheney Is an "Entity Within the Executive Branch,"* 53 ST. LOUIS U. L.J. 281, 300–08 (2008) (arguing that the vice presidency must be considered part of the executive branch).

[28] *See* Albert, *supra* note 24, at 823–31.

[29] *See id.* at 824. The anti-Federalists' concerns over the Vice President's uncertain and hybrid constitutional status actually represented their larger concerns over the power of the executive branch and the Federalists' functionalist approach to the separation of powers doctrine. *See id.* at 824–25. The anti-Federalists went so far as to refuse to recognize Vice President John Adams as the Vice President while he was in the Senate chambers, referring only to him as the President of the Senate. *See id.* at 824.

functions, and that I could not take any part whatever in executive consultations, even were it proposed."[30] Later Presidents and Vice Presidents expressed a similar sentiment that the Vice President was not part of the executive branch, and thus the Incompatibility Clause[31] precluded him from exercising executive powers.[32] Other Vice Presidents have taken a less formalistic view of the vice presidency, considering its hybrid status as more intriguing than troubling.[33] Vice President Gerald Ford remarked that the framers of the Constitution had technically violated the separation of powers doctrine in establishing the vice presidency: "The Vice President is a constitutional hybrid. Alone among federal officials he stands with one foot in the legislative branch and the other in the executive."[34]

Part of this early uncertainty concerning the Vice President's constitutional status stemmed from the fact that the Constitution assigns the Vice President very few explicit duties and powers.[35] The Vice President's most obvious and important constitutional function is not even explicitly stated in the Constitution: remaining prepared to as-

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[30] Friedman, *supra* note 22, at 1722. Richard Friedman has suggested that Jefferson may have sought to free himself of all burdens in his capacity as Vice President, so he could create his own political party. *See id.* at 1722 n.82.

[31] *See* U.S. CONST. art. I, § 6, cl. 2. The Incompatibility Clause states that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." *Id.* Seth Barrett Tillman has recently suggested that neither the President nor the Vice President are "officers of the United States" and thus are not precluded from serving concurrently as members of Congress. *See* Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 15 n.37, 32 n.79 (2008). *But see* Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 35, 41–43 (2008).

[32] *See* GOLDSTEIN, *supra* note 22, at 137. Echoing this sentiment, Glenn Reynolds has recently argued that because the Vice President should properly be located in the legislative branch, President George W. Bush's delegation of executive duties to Vice President Dick Cheney is unconstitutional under the separation of powers doctrine. *See* Reynolds, *supra* note 27, at 1540, 1542.

[33] *See* GOLDSTEIN, *supra* note 22, at 138. Richard Friedman has suggested that the Incompatibility Clause does not prevent the Vice President from assuming significant power in the executive branch, as the Vice President is not a "Member" of the Senate as envisioned under the Incompatibility Clause. Friedman, *supra* note 22, at 1720–21.

[34] Gerald Ford, *On the Threshold of the White House*, ATLANTIC MONTHLY, July 1974, at 63. Writing for the *Atlantic Monthly* upon his accession to the vice presidency, Gerald Ford also noted: "The Vice President straddles the constitutional chasm which circumscribes and checks all others. He belongs both to the President and to the Congress, even more so under the Twenty-fifth Amendment, yet he shares power with neither." *Id.*

[35] *See* GOLDSTEIN, *supra* note 22, at 134.

sume the presidency at any moment.[36] As the potential successor to the President, the Vice President is thus required to meet the same eligibility requirements as the President,[37] and is the only other popularly elected national official.[38] Article II thus recognizes the Vice President's importance to the executive branch, providing for the concurrent election of the President and Vice President[39] and the Vice President's designation as the President's successor.[40] The Vice President's most explicit constitutional function is found not in Article II, however, but rather in Article I.[41] As President of the Senate, the Vice President has the power to cast tie-breaking votes in the Senate and to make limited procedural rulings.[42] Although Vice Presidents have devoted increasingly less time to their duties as President of the Senate,[43] given the explicitness of Article I's grant of power and the attentiveness with which Vice Presidents initially presided over the Senate, it is not surprising that many early commentators construed the vice presidency as legislative in nature.[44]

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[36] *See* Goldstein, *supra* note 24, at 540. Regarding the Vice President's crucial role, then-Vice President John Adams noted: "I am Vice President. In this I am nothing, but I may be everything." DAVID MCCULLOUGH, JOHN ADAMS 402 (2001).

[37] *See* U.S. CONST. amend. XII.

[38] *See id.* art. II, § 1, cl. 1.

[39] *See id.* amend. XII. Article II, Section 1, Clause 3 originally allowed electors to cast two undifferentiated votes for President and Vice President, but the stalemate resulting from the election of 1800 quickly led to the ratification of the Twelfth Amendment in 1804, which forced electors to distinguish their votes for the two offices. *See id.* art. II, § 1, cl. 3; *id.* amend. XII.

[40] *See id.* art. II, § 1, cl. 6; *id.* amend. XXV. The Twenty-Fifth Amendment clarified and expanded the Vice President's role in presidential succession matters, but the centrality of the vice presidency to the continuity of the executive branch existed in the Constitution from its inception. *See id.* art. II, § 1, cl. 6.

[41] *See id.* art. I, § 3, cl. 4.

[42] *See* U.S. CONST. art. I, § 3, cl. 4; GOLDSTEIN, *supra* note 22, at 142, 143. The Constitution also gives the Vice President responsibility for presiding over the official counting of electoral votes. *See* U.S. CONST. art. II, § 1, cl. 3; *id.* amend. XII. This has placed numerous Vice Presidents, particularly Thomas Jefferson and Al Gore, in the awkward position of counting electoral votes in contentious presidential elections in which they are competing. *See* Albert, *supra* note 24, at 822–23; *see also* Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 552 (2004) (discussing Thomas Jefferson's questionable decisions as President of the Senate during the presidential election of 1800).

[43] *See* JODY C. BAUMGARTNER, THE AMERICAN VICE PRESIDENCY RECONSIDERED 116 (2006). The Vice President's waning involvement in the affairs of the Senate is largely due to the Vice President's increased institutional and political power within the executive branch, but it also is occurring because Senate rules greatly constrain the actual powers of the Senate's presiding officer. *See* GOLDSTEIN, *supra* note 22, at 142.

[44] *See* Albert, *supra* note 24, at 824; *see also supra* note 29.

Given the Vice President's limited powers under the Constitution and the unwillingness of many Presidents to delegate any powers to the Vice President, the vice presidency remained a disparaged position throughout the nineteenth and early twentieth centuries.[45] The status and power of the Vice President began to change in the mid-twentieth century, however, as Presidents increasingly elected to grant the Vice President a substantive role in the executive branch.[46] Franklin D. Roosevelt, for instance, helped advance the Vice President's status by reinstating the Vice President's attendance at Cabinet meetings,[47] while Harry Truman secured legislation granting the Vice President a permanent seat on the National Security Council in 1949.[48] Scholars have also noted that the office of the Vice President increasingly became institutionalized as part of the executive branch in the later twentieth century, as the Vice President relocated his offices from Capitol Hill to the Old Executive Office Building in 1961, secured a line item in the executive budget in 1969,[49] and occupied his own personal offices in

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[45] *See* Garvey, *supra* note 22, at 575. Many Presidents prior to the mid-twentieth century were unwilling to delegate duties to the Vice President because of the inherent mistrust that existed between the two offices; Presidents usually did not select their own vice presidential nominees and thus viewed those officials' political ambition with skepticism. *See* GOLDSTEIN, *supra* note 22, at 139. Henry Kissinger once remarked that "[t]he relationship between the President and any Vice President is never easy; it is, after all, disconcerting to have at one's side a man whose life's ambition will be achieved by one's death." *Id.* at 146.

[46] *See* BAUMGARTNER, *supra* note 43, at 116–17. The Vice President remains entirely dependent on the President to delegate additional duties and powers, and thus the President can elect to take away all delegated powers. *See* GOLDSTEIN, *supra* note 22, at 146; *see also* Subhawong, *supra* note 27, at 292–96 (noting that the vice presidency has migrated to the executive branch in the twentieth century).

[47] *See* Friedman, *supra* note 22, at 1723. Serving as Vice President for President Warren G. Harding, Calvin Coolidge was the first Vice President to regularly attend Cabinet meetings, but the practice was discontinued when Coolidge became President. *See id.* at 1722–23. In one of the most significant grants of substantive power to a Vice President, Roosevelt also appointed Vice President Henry Wallace to head of the Board of Economic Welfare. *See id.* at 1717.

[48] National Security Act Amendments of 1949, ch. 412, § 3, 63 Stat. 578, 579 (amending National Security Act of 1947, tit. I, § 101, 61 Stat. 495, 496). The Vice President's other statutorily assigned role is as a member of the Board of Regents of the Smithsonian Institution. 20 U.S.C. §§ 41–42 (2006); *see also* BAUMGARTNER, *supra* note 43, at 116–17.

[49] *See* Albert, *supra* note 24, at 834. The vice presidential budgetary line is recognized by statute. 3 U.S.C. § 106(a)–(b) (2006). Subsection (a), for example, provides that such funds are entitled for the "performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." 3 U.S.C. § 106(a). The constitutional status of the Vice President's office, however, is complicated by the fact that the Vice President draws his or her salary from the legislative branch. 5 U.S.C. § 2106 (2006) ("For the purpose of this title, 'Member of Congress' means the Vice President, a member of the Senate or the House of Representatives . . . ."); *see* Garvey, *supra* note 22, at 581–82.

the West Wing of the White House for the first time in 1977.[50] These changes reflected the growing power of the presidency in the twentieth century, but they also provided the Vice President with real political power for the first time and drew the Vice President further into the executive branch.[51]

The Vice President's changing role and significance in the mid-twentieth century produced confusion and debate even within the Department of Justice's Office of Legal Counsel ("OLC").[52] In a pair of memoranda from 1961 on the Vice President's exercise of executive powers, the OLC asserted that separation of powers principles do not preclude the Vice President from exercising executive duties, because it would be "troublesome conceptually" to classify the Vice President as a member of the legislature.[53] The OLC ultimately concluded that the Vice President occupied a unique constitutional position: "Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter."[54] The office of Vice President Dick Cheney would later quote this same language to support its claims that the Vice President is not part of the executive branch.[55]

A memorandum written by the OLC a year later in 1962 located the vice presidency within the legislative branch.[56] Despite stating a year earlier that it was conceptually troublesome to categorize the Vice President as a member of the legislature, the OLC argued that it was only

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[50] *See* Albert, *supra* note 24, at 834. Additionally, the office of the Vice President was first listed in the United States Government Organization Manual as part of the Executive Office of the President in 1972. BAUMGARTNER, *supra* note 43, at 110.

[51] *See* GOLDSTEIN, *supra* note 22, at 140.

[52] *See* Memorandum from Nicholas Katzenbach, Assistant Att'y Gen., Off. of Legal Couns., on Constitutionality of the Vice President's Service as Chairman of the National Aeronautics and Space Council 4 (Apr. 18, 1961) [hereinafter Katzenbach Memo, Apr. 1961], *available at* http://fas.org/irp/agency/doj/olc/041861.pdf; Memorandum from Nicholas Katzenbach, Assistant Att'y Gen., Off. of Legal Couns., on Participation by the Vice President in the Affairs of the Executive Branch 11 (Mar. 9, 1961) [hereinafter Katzenbach Memo, Mar. 1961], *available at* http://fas.org/irp/agency/doj/olc/030961.pdf; Memorandum from Harold F. Reis, Acting Assistant Att'y Gen., Off. of Legal Couns., on Status of Vice Presidential Employees for Tax Purposes 3–4 (July 24, 1962), *available at* http://fas.org/irp/agency/doj/olc/072462.pdf. As an office within the Department of Justice, the Office of Legal Counsel provides legal advice to the President and other Executive agencies, often on complex constitutional questions. *See* 28 C.F.R. § 0.25 (2008).

[53] *See* Katzenbach Memo, Apr. 1961, *supra* note 52, at 4; Katzenbach Memo, Mar. 1961, *supra* note 52, at 11.

[54] *See* Katzenbach Memo, Apr. 1961, *supra* note 52, at 4; Katzenbach Memo, Mar. 1961, *supra* note 52, at 11.

[55] *See infra* notes 82, 85 and accompanying text.

[56] *See* Memorandum from Harold F. Reis, *supra* note 52, at 3.

reasonable to conclude that the Vice President was in the legislative branch.[57] Acknowledging that the office of the Vice President is created by Article II and its holder is listed along with other executive branch officials in the Impeachment Clause,[58] the OLC concluded that "the Vice President has a unique status in the legislative branch. [These constitutional provisions] do not indicate that he is not 'in' it. Indeed, from the very beginning of the Nation, the office of Vice President has been considered as being in the legislative branch."[59] Although these memoranda were written prior to the ratification of the Twenty-Fifth Amendment, the fact that even the OLC struggled to clearly articulate the Vice President's proper constitutional position illustrates that this issue was far from settled well into the twentieth century.[60]

The Vice President's prominence within the executive branch and status under the Constitution were bolstered—if not somewhat clarified—by the ratification of the Twenty-Fifth Amendment in 1967.[61] Ratified in part to clarify the issue of presidential succession, the Twenty-Fifth Amendment assigns the Vice President a prominent role in presidential succession and disability matters.[62] In addition to recognizing the Vice President's status as President upon succession to the presidency, the Twenty-Fifth Amendment grants the Vice President a central role in determining the President's incapacity and acknowledges his power to act as President during the President's disability.[63] Perhaps most importantly, the Twenty-Fifth Amendment demonstrates the Vice President's importance to our constitutional system by explicitly providing a means to fill a vacancy in the vice presidency.[64] Some scholars have argued that the Twenty-Fifth Amendment thus represents something of a new constitutional vision of the vice presidency.[65] By further

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[57] *See id.*

[58] *See* U.S. CONST. art. II, § 1, cl. 1. The Impeachment Clause in Article II states, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4, cl. 1. Harold Reis's memorandum also recognizes that Article I, Section 5 precludes the Senate from expelling the Vice President, despite seemingly being "in the legislative branch." Memorandum from Harold F. Reis, *supra* note 52, at 3; *see* U.S. CONST. art. I, § 5, cls. 1–2.

[59] *See* Memorandum from Harold F. Reis, *supra* note 52, at 4.

[60] *See infra* notes 75–86 and accompanying text.

[61] *See* U.S. CONST. amend. XXV; Goldstein, *supra* note 24, at 526.

[62] Goldstein, *supra* note 24, at 527.

[63] *See* U.S. CONST. amend. XXV §§ 1, 3–4.

[64] *See id.* amend. XXV § 2. One of the chief sponsors of the Twenty-Fifth Amendment, Senator Birch Bayh, noted that the Vice President was "'the second most important office in the land.'" Goldstein, *supra* note 24, at 529 (quoting 110 CONG. REC. 22,986 (1964)).

[65] Goldstein, *supra* note 24, at 526; *see* Albert, *supra* note 24, at 859.

linking the President and Vice President, the amendment also helped draw the vice presidency further into the executive branch.[66]

The ratification of the Twenty-Fifth Amendment and the continued delegation of duties by the President have largely defined the modern vice presidency, but equally important to the Vice President's role within the executive branch has been the recent normalization of the Vice President's role as a close presidential advisor.[67] The specific advisory functions carried about by recent Vice Presidents have varied with different administrations, with Vice Presidents Walter Mondale, Al Gore, and Dick Cheney exercising more prominent roles than Vice Presidents George H.W. Bush and Dan Quayle, but every modern Vice President has been an important advisor within the executive branch.[68] In addition to being a member of the National Security Council, the Vice President currently serves on two other important advisory councils: the Domestic Policy Council[69] and National Economic Council.[70] Perhaps most importantly for the Vice President, he or she also has weekly private meetings with the President to discuss political and policy matters.[71] Despite the Vice President's increased political prominence and association with the executive branch, these advisory functions remain the Vice President's only substantive function within the executive branch.[72]

B. *The Cheney Vice Presidency*

1. Cheney's Vision of the Vice Presidency

The vice presidency of Dick Cheney from 2000 to 2008 was remarkable in many respects, but perhaps in no way more than in Cheney's efforts to champion the Vice President's constitutional status as outside of the executive branch while exercising an unparalleled degree of execu-

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[66] *See* Goldstein, *supra* note 24, at 509.

[67] *See id.* at 545.

[68] *See* Goldstein, *supra* note 11, at 381.

[69] *See* Exec. Order No. 12,859, 58 Fed. Reg. 44,101 (Aug. 16, 1993), *amended by* Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003).

[70] *See* Exec. Order No. 12,835, 58 Fed. Reg. 6189 (Jan. 25, 1993), *amended by* Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003).

[71] Goldstein, *supra* note 24, at 545–46. President Gerald Ford and Vice President Nelson Rockefeller had weekly private meetings to discuss policy and political matters, a tradition that has been continued by subsequent Presidents and Vice Presidents. *See id.*

[72] *See* Albert, *supra* note 24, at 831–37.

tive power.[73] As one of the chief architects of President George W. Bush's foreign policy, the director of the administration's legal response to 9/11, and the committee head that reviewed all appeals from the Office of Management and Budget, Vice President Cheney assumed not simply an advisory role, but an operational role within the executive branch.[74]

Despite exercising power so effectively in the executive branch that he is widely acknowledged to be the "most powerful vice president in history,"[75] Cheney's office repeatedly asserted that the vice presidency was not located within the executive branch.[76] Beginning in 2002, the office of the Vice President refused to submit classified documents to the Information Security Oversight Office as previously understood to be required by executive order,[77] claiming that the Vice President's hybrid functions put his office beyond the reach of that order.[78] Vice President Cheney's chief of staff, David Addington, later clarified the Vice President's position to the House Oversight and Government Reform Committee by noting that the Vice President, like the President, was not an "agency" within the meaning of the executive order,[79] and by implication not "an entity within the executive branch."[80] David Addington was also forced under subpoena to testify before a House Judiciary Subcommittee on June 26, 2008, regarding the harsh interrogation methods supported by President George W. Bush and Vice President Che-

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[73] *See* Kenneth Walsh, *The Man Behind the Curtain*, U.S. NEWS & WORLD REP., Oct. 5, 2003, at 26.

[74] *See* Goldstein, *supra* note 11, at 384–85.

[75] *See* Walsh, *supra* note 73, at 26.

[76] *See infra* notes 77–86 and accompanying text.

[77] *See* Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), *amended by* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003).

[78] *See* Posting of Mark Silva to The Swamp, http://www.swamppolitics.com/news/politics/blog/2006/05/cheneys_secret_classifications.html (May 26, 2006, 14:00 CDT); *see also* Garvey, *supra* note 22, at 588–95 (tracing the events and arguments surrounding the Office of the Vice President's refusal to comply with declassification procedures).

[79] Letter from David Addington, Chief of Staff to Vice President Dick Cheney, to John Kerry, U.S. Senator (June 26, 2007), *available at* http://kerry.senate.gov/newsroom/pdf/Addington_Letter.pdf; *see* Michael Abramowitz, *Cheney Aide Explains Stance on Classified Material*, WASH. POST, June 27, 2007, at A05.

[80] *See* 68 Fed. Reg. at 15,330 (noting that "agency" includes "any other entity within the executive branch that comes into the possession of classified information"). The Office of Legal Counsel also supported this position. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, on Whether the Office of the Vice President Is an "Agency" for Purposes of Executive Order 12,958, as Amended (July 20, 2007), *available at* http://fas.org/irp/agency/doj/olc/072007.pdf.

ney.[81] In response to an inquiry as to which branch of government the Vice President falls under, Addington quoted the memo written by the OLC in 1961 in which the Vice President is deemed to be part of neither the executive nor the legislative branch, but "attached by the Constitution" to the latter.[82]

The extreme to which Vice President Cheney went in asserting this constitutional theory of the vice presidency is perhaps best epitomized by the Vice President's success in changing the classification of the Office of the Vice President in the "Plum Book," the quadrennial listing of presidential appointments in the federal government.[83] Due to Cheney's efforts, the 2004 and 2008 editions of the Plum Book do not list potential job openings in the Office of the Vice President.[84] Instead, the Plum Book includes an appendix that states, "The Vice Presidency is a unique office that is neither a part of the executive branch nor a part of the legislative branch, but is attached by the Constitution to the latter."[85] Vice President Cheney's attempts to position the vice presidency outside of the executive branch were striking not only because of their scope, but also because they seem utterly inconsistent with the Court's extension of executive protection to the vice presidency.[86]

2. Extending Executive Protection to the Vice President—*Cheney v. U.S. District Court for the District of Columbia*

The only recent U.S. Supreme Court case to address the vice presidency—*Cheney v. U.S. District Court for the District of Columbia* in 2004—essentially extended the protection of executive privilege to the Vice President.[87] This suit was brought under the Federal Advisory Committee Act to obtain the records of an energy task force chaired by Vice

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[81] *See* Dana Milbank, *When Anonymity Fails, Be Nasty, Brutish and Short*, WASH. POST, June 27, 2008, at A03; Scott Shane, *Two Testify on Memo Spelling Out Interrogation Methods*, N.Y. TIMES, June 27, 2008, at A15.

[82] *See* Milbank, *supra* note 81, at A03; *see also* Katzenbach Memo, Apr. 1961, *supra* note 52, at 4; Katzenbach Memo, Mar. 1961, *supra* note 52, at 11; *supra* notes 53–60 and accompanying text.

[83] *See* H. COMM. ON GOV'T REFORM, 110TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS, app. 5 (2008), *available at* http://www.gpoaccess.gov/plumbook/2008/p210_appendix5.pdf. The "Plum Book" is officially known as the United States Government Policy and Supporting Positions. *See* Lyndsey Layton & Lois Romano, *"Plum Book" Is Obama's Big Help-Wanted Ad*, WASH. POST, Nov. 13, 2008, at A01; Timothy Noah, Post *Drinks Cheney's Kool-Aid!*, SLATE, Nov. 13, 2008, http://www.slate.com/id/2204616/.

[84] *See* Noah, *supra* note 83.

[85] H. COMM. ON GOV'T REFORM, *supra* note 83, at app. 5.

[86] *See supra* notes 73–85 and accompanying text.

[87] *See* 542 U.S. 367, 372 (2004).

President Cheney.[88] Instead of seeking monetary damages against Vice President Cheney in his personal capacity, the plaintiffs in *Cheney* sought injunctive and declaratory relief against the Vice President in his official capacity.[89] Although the Court eventually concluded that the Vice President need not invoke executive privilege for a court to restrict an overly broad discovery order,[90] the Court linked the President and Vice President as seemingly inseparable in any discussion about judicial proceedings against the executive branch.[91] On the most basic level, the Court connected the President and Vice President by the fact that in a suit against the Vice President, the Court devoted most of its attention to discussing *executive* privilege.[92] Commenting on the nature of the case, the Court stated: "The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives."[93] By framing the case as one in which the executive branch's interests and powers were at stake, the Court largely identified the Vice President as within the executive branch.[94]

The Court's efforts to lump together the President and Vice President were not limited to such passive intimations, but included manipulating the language of prior executive immunity and privilege cases.[95] In noting that courts have hesitated to exercise judicial power over the executive branch, the Court cited *Nixon v. Fitzgerald*[96] for the proposition that "the *Executive's* 'constitutional responsibilities and status [are] factors counseling judicial deference and restraint.'"[97] The *Cheney* Court, in

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[88] *See id.* at 373.

[89] *See id.* at 374. Equitable relief against the President seems to be largely precluded. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (holding that the President is not subject to the Administrative Procedure Act). *But see* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613–14 (1997) (arguing that nonstatutory review provides a means to enjoin certain presidential actions).

[90] *See Cheney*, 542 U.S. at 391.

[91] *See* Vikram David Amar, *The* Cheney *Decision—A Missed Chance to Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185, 192–99 (criticizing the Court for complicating the executive immunity jurisprudence and "repeatedly and reflexively" lumping the President and Vice President together).

[92] *See Cheney*, 542 U.S. at 381. The Court noted that "[w]ere the Vice President not a party in the case . . . [the lower court's decision] might present different considerations." *Id.*

[93] *Id.* at 385.

[94] *Id.* at 391–92; *see id.* at 372 (noting that the lower courts had ordered "the *Vice President and other senior officials in the Executive Branch* to produce information about a task force" (emphasis added)).

[95] *See infra* notes 96–103 and accompanying text.

[96] 457 U.S. 731 (1982).

[97] *Cheney*, 542 U.S. at 385 (emphasis added).

fact, misquoted *Fitzgerald*, as the original opinion referred to "the *President's* constitutional responsibilities and status."[98] Somewhat similarly, the *Cheney* Court observed that the visibility of the "Offices of the President and Vice President" made them easy targets for civil liability and thus needed greater judicial protection, an assertion seemingly taken from *Fitzgerald*.[99] Once again, though, the Court misconstrued the language from *Fitzgerald* to suit its purposes, as the *Fitzgerald* Court's reference to "the President"[100] became "Offices of the President and Vice President" in the *Cheney* decision.[101] Perhaps most striking was the Court's assertion that—at least in the context of executive privilege—a mandamus petition by either the President or Vice President raised the same separation of powers considerations.[102] By explicitly linking the President and Vice President and suggesting that the involvement of either office in the lawsuit raised similar separation of powers questions, the Court actively incorporated the Vice President into the executive branch and demonstrated its willingness to view the two offices in similar terms.[103]

II. Executive Immunity Jurisprudence

Despite Vice President Cheney's efforts to position the vice presidency outside the executive branch, the Court's decision in *Cheney v. U.S. District Court for the District of Columbia* suggests that the Vice President's potential liability to civil suits for money damages must be ana-

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[98] *Fitzgerald*, 457 U.S. at 753 (emphasis added).

[99] *See Cheney*, 542 U.S. at 386. The *Cheney* decision stated: "'In view of the visibility of' the Offices of the President and Vice President and 'the effect of [their] actions on countless people,' they are 'easily identifiable target[s] for suits for civil damages.'" *Id.* (quoting *Fitzgerald*, 457 U.S. at 753).

[100] *Fitzgerald*, 457 U.S. at 753. The language from *Fitzgerald* reads: "In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." *Id.*

[101] *Cheney*, 542 U.S. at 386.

[102] *See id.* at 382. Having cited one of the most important separation of powers cases involving the President, *United States v. Nixon*, the Court remarked, "These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President." *Id.* Later in its decision, the Court noted, "As this case implicates the separation of powers, the Court of Appeals must also ask . . . whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390; *see infra* notes 254–260.

[103] *See* Amar, *supra* note 91, at 207 (noting that the Court could have emphasized the Vice President's status within the executive branch as a means to justify its decision).

lyzed under the Court's executive immunity jurisprudence.[104] Executive immunity generally shields officials from damages liability when performing official duties.[105] Unlike legislative immunity, executive immunity does not have a textual basis in the Constitution.[106] As a result, courts have employed political, policy, and constitutional arguments to create executive immunity to protect and promote the efficient and effective functioning of the executive branch.[107] The Court initially granted only absolute immunity to executive officials.[108] Since the 1970s, however, the Court has embraced a functional analysis of immunity that recognizes both absolute immunity and qualified immunity.[109] Absolute immunity provides complete protection from claims for money damages, whereas qualified immunity shields officials only if they reasonably believed their conduct to be legal.[110] Within this scheme, the President of the United States has been granted absolute immunity from civil suits for official acts taken within the "outer perimeter" of the President's duties,[111] while presidential aides have been afforded qualified immunity.[112] The Vice President's location in the Court's executive immunity jurisprudence has yet to be determined.[113]

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[104] *See* 542 U.S. 367, 388 (2004). In addition to the historical and constitutional evidence indicating that the Vice President is firmly, if not wholly, within the executive branch, the *Cheney* court's reliance on past executive *immunity* decisions to address executive privilege questions involving the Vice President suggests that the Vice President would largely fall within the Court's executive immunity jurisprudence. *See id.*

[105] *See* Chen, *supra* note 2, at 262; Theodore P. Stein, Note, Nixon v. Fitzgerald*: Presidential Immunity as a Constitutional Imperative*, 32 CATH. U. L. REV. 759, 759 (1983).

[106] *See* U.S. CONST. art. I, § 6, cl. 1. Legislative immunity is explicitly provided for in the Speech or Debate and Arrest Clauses in the Constitution. *See id.* For an attempt to ground temporary presidential immunity somewhat in the text of the Arrest Clause, see Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The* Nixon *and* Clinton *Cases*, 108 HARV. L. REV. 701, 702 (1995).

[107] *See* Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 348–51 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 35–36 (1989); Michael T. Matraia, Note, *Running for Cover Behind Presidential Immunity: The Oval Office as Safe Haven from Civil Suits*, 29 SUFFOLK U. L. REV. 195, 203 (1995).

[108] *See* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1125 (1981); Laurier W. Beaupre, Note, *Birth of a Third Immunity? President Bill Clinton Secures Temporary Immunity from Trial*, 36 B.C. L. REV. 725, 733 (1995).

[109] *See* Cass, *supra* note 108, at 1129; Stein, *supra* note 105, at 760.

[110] *See* Chen, *supra* note 2, at 262.

[111] *See* Clinton v. Jones, 520 U.S. 681, 694 (1997); Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). Neither the *Clinton* nor *Fitzgerald* courts explicitly defined what constitutes the "outer perimeter" of the President's official duties. *See infra* note 146.

[112] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[113] *See supra* note 8 and accompanying text.

A. *Judicial Development of Executive Immunity*

1. Original Standard for Executive Immunity

The Supreme Court first examined the general policy rationales behind official immunity in 1871 in *Bradley v. Fisher*.[114] In holding that providing absolute immunity for judicial misconduct for a federal judge was necessary to safeguard his judicial independence, the Court first articulated the policy reasons behind absolute immunity.[115] Twenty-five years later in *Spalding v. Vilas*, the Supreme Court extended absolute immunity to executive officers for the first time.[116] The Court found that the United States Postmaster General was absolutely immune from civil suit for actions taken within the scope of his official authority.[117] Applying similar reasoning from *Bradley*, the *Spalding* Court concluded that even if a Cabinet official had acted with malice, the proper functioning of the government demanded that such officials be absolutely immune from civil suits for damages.[118] Observing that immunity of governmental officials ultimately served the public good, the Court remarked that "the interests of the people" require that such protections be afforded to executive officials.[119]

This gradual extension of absolute immunity to include other federal executive officials[120] culminated in 1959 in *Barr v. Matteo* with the Supreme Court's decision to make absolute immunity available to executive officials below Cabinet rank.[121] In granting absolute immunity to the acting director of the Office of Rent Stabilization in a common law tort action for libel, the Court again suggested that fear of civil liability would constrain the discretion exercised by executive officials and deter them from acting resolutely in the fulfillment of their duties.[122] Highlighting an additional factor not mentioned in *Spalding*, the Court noted that executive officials subject to civil liability would have to devote considerable time and resources to defend themselves against

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[114] *See* 80 U.S. (13 Wall.) 335 (1871).

[115] *See Bradley*, 80 U.S. at 347. The Supreme Court had previously addressed the liability of federal officers for damages claims, but had not explicitly addressed the policy considerations on which official immunity was based. *See* Stein, *supra* note 105, at 763 n.30.

[116] *See* 161 U.S. 483, 498–99 (1896).

[117] *See id.*

[118] *See id.* at 499.

[119] *Id.* at 498.

[120] *See* Stein, *supra* note 105, at 764 & n.38.

[121] *See* 360 U.S. 564, 574 (1959).

[122] *See id.* at 570–71.

such suits.[123] Although the Court still emphasized that an official could only be immune from civil suit for acts within the "outer perimeter" of his authority, *Matteo* represents the high-water mark for executive officials claiming absolute immunity.[124]

2. The Supreme Court's Changing Immunity Analysis

The Supreme Court's executive immunity jurisprudence first began to move away from a rigid adherence to absolute immunity in 1973 in *Scheuer v. Rhodes*.[125] The Court was confronted with a claim against the Ohio Governor under 42 U.S.C. § 1983,[126] asserting that he had recklessly deployed the National Guard in the 1970 Kent State University shooting.[127] Noting that absolute immunity for state executive officials would drain Section 1983 of any meaning,[128] the Court concluded nonetheless that state executive officials could claim qualified immunity instead.[129] Under the Court's qualified immunity standard, executive officials could claim immunity from civil suits for money damages if they reasonably believed in good faith that their actions were both legal and within the scope of their authority.[130]

Despite the noticeable changes in the Supreme Court's position in *Scheuer*, the Court did not engage in a broad reconceptualization of its immunity jurisprudence until *Imbler v. Pachtman*[131] in 1976 and *Butz v. Economou*[132] in 1978. In holding that a state prosecutor was absolutely immune from a Section 1983 claim, the *Imbler* Court adopted a functional approach to absolute immunity, focusing on the prosecutor's "quasi-judicial" function and need for independence, not on the fact

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[123] *See id.* at 571.

[124] *See id.* at 575.

[125] *See* 416 U.S. 232 (1974).

[126] 42 U.S.C. § 1983 (2000). Section 1983 provides a private right of action against anyone who, acting under the color of state law, deprives another of any rights, privileges, or immunities guaranteed by statute or the Constitution. *See id.*

[127] *See Scheuer*, 416 U.S. at 234.

[128] *Id.* at 248.

[129] *See id.* at 247–48; *see also* Burris, *supra* note 2, at 124–40 (criticizing governmental immunity given the existence of § 1983).

[130] *See Scheuer*, 416 U.S. at 247–48; Beaupre, *supra* note 108, at 738. This test for qualified immunity was further complicated by the Court in 1975 in *Wood v. Strickland*, where lack of malice was made an additional requirement in claiming qualified immunity. 420 U.S. 308, 322 (1975); *see* Beaupre, *supra* note 108, at 738 n.138.

[131] *See* 424 U.S. 409 (1976).

[132] *See* 438 U.S. 478 (1978).

that the prosecutor occupied a particular executive office.[133] Building on its decision in *Imbler*, the Court in *Butz* concluded that executive officials of Cabinet rank exercising discretion could claim only qualified immunity for constitutional violations.[134] Distinguishing *Spalding* and *Matteo* on the grounds that they did not involve violations of constitutional rights,[135] the Court asserted that qualified immunity should be the general standard for executive officials.[136] Nevertheless, the Court held open the possibility that officials might still qualify for absolute immunity in certain circumstances.[137] In the Court's view, absolute immunity would be appropriate for those officials whose special functions were "essential for the conduct of the public business,"[138] a functional analysis that extended absolute immunity to an agency attorney and administrative law judge, but not to a Cabinet official.[139]

As a result of the Supreme Court's decisions in *Imbler* and *Butz*, the U.S. Court of Appeals for the District of Columbia Circuit refused to grant absolute immunity to President Nixon in 1979 in *Halperin v. Kiss-*

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[133] *See* 424 U.S. at 430. This functional approach seemingly led to a narrowing of the reach of absolute immunity, as the Court's dicta suggested that a prosecutor would not receive absolute immunity when acting in his or her administrative or investigative capacity. *See id.* at 430–31. For an analysis of the Supreme Court's more recent discussion of prosecutorial immunity, see Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 477–85 (2008).

[134] *See Butz*, 438 U.S. at 507. Although *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), recognized an implied cause of action, the Court did not address the civil liability of these executive officials. *See* 403 U.S. at 397–98; Stein, *supra* note 105, at 768 n.69. On remand, the U.S. Court of Appeals for the Second Circuit held that the officials were not acting within the scope of their authority and thus not entitled to any immunity. *See* Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1342–43 (1972), *on remand from* 403 U.S. 388.

[135] *See Butz*, 438 U.S. at 495. The four dissenting members of the Court strongly disagreed with the grant of qualified immunity—instead of absolute immunity—to the Secretary of Agriculture and the majority's reading of *Spalding* and *Matteo*. *Id.* at 518 (Rehnquist, J., dissenting) ("The Court's protestations to the contrary notwithstanding, this decision seriously misconstrues our prior decisions, finds little support as a matter of logic or precedent, and perhaps most importantly, will, I fear, seriously 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

[136] *See id.* at 507 (majority opinion).

[137] *See id.*

[138] *Id.*

[139] *See id.* at 515. The Court once again justified its grant of absolute immunity on the policy grounds that officers with quasi-judicial functions required independence and an unimpaired ability to make difficult decisions. *Id.* at 512 ("Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.").

inger.[140] In a *Bivens* action against the President for illegally wiretapping Morton Halperin's telephone, the appeals court concluded that neither public policy grounds nor the President's unique constitutional status justified a grant of absolute immunity.[141] Although separation of powers concerns suggested that a court should be cautious in reviewing the actions of the President,[142] the Supreme Court ultimately concluded that differentiating the President from other executive officials in immunity cases would only serve to place the President above the law.[143]

B. *Defining and Refining Absolute Immunity*

1. Absolute Presidential Immunity—*Nixon v. Fitzgerald*

The most significant case in the Supreme Court's modern jurisprudence on presidential immunity was decided in 1982 in *Nixon v. Fitzgerald*.[144] This suit was initiated by a former Air Force analyst who claimed that President Nixon and his presidential aides violated his constitutional rights by firing him in retaliation for testimony he had given to Congress.[145] Although the Court was deeply divided on the issue, a majority of the Court held that the President was absolutely immune from civil liability for damages for "acts within the 'outer perimeter' of his official responsibility."[146] This grant of absolute immunity was not simply a policy judgment by the Court, but a "functionally mandated incident of the President's unique office."[147]

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[140] 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd in part by an equally divided Court*, 452 U.S. 713 (1981) (per curiam).

[141] *See id.* at 1210–13.

[142] *Id.* at 1211. For an analysis of the President's general amenability to judicial proceedings, see Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 Ky. L.J. 739, 741–83 (1992).

[143] *See Halperin*, 606 F.2d at 1213. This holding was affirmed by an equally divided Supreme Court in a per curiam decision. *Halperin*, 452 U.S. 713; *see* Beaupre, *supra* note 108, at 740.

[144] 457 U.S. at 731.

[145] *See id.* at 733–40.

[146] *Id.* at 756. Although the Court in *Fitzgerald* suggested that determining the particular function involved in the President's relevant decision or action would be too difficult, it noted that the firing of Fitzgerald was clearly within the outer perimeter of the President's duties, as the President was constitutionally and statutorily empowered to reorganize the Air Force. *See id.* at 756–57; *see also id.* at 761 n.4 (Burger, C.J., concurring) (noting that although the President's authority is far greater than that of any other official, it would still be appropriate to question whether the President had acted "within the scope of the official's constitutional and statutory duties").

[147] *Id.* at 749 (majority opinion).

For the majority, the fact that Article II vests all executive power in the President makes the President unique within our constitutional scheme,[148] as the President alone is responsible for enforcing the federal law, conducting foreign affairs, and managing the executive branch.[149] The Court noted this obvious but crucial fact: "The President's unique status under the Constitution distinguishes him from other executive officials."[150] Given the President's distinctive constitutional position and duties, the majority found it difficult to apply its normal functional analysis in differentiating the President's office from his functions.[151] The Court thus departed from its functional analysis by concluding that absolute immunity should be extended generally to any action within the outer perimeter of the President's official responsibility.[152] As the Court noted, such separation of powers concerns did not prevent all assertions of judicial power over the President, but such considerations counseled against subjecting the President to "merely private suit[s] for damages."[153] Under the Court's separation of powers balancing test,[154] the public interest is better served by granting the President absolute immunity in civil suits for damages than by exposing the executive branch to the intrusion of the judiciary.[155]

The four dissenting justices wrote an equally forceful opinion, arguing that the majority's grant of absolute presidential immunity effectively placed the President above the law.[156] Criticizing the majority's decision as ambiguous and policy-driven,[157] the dissenting justices claimed that the majority had abandoned the Court's functional immunity analysis by endowing the office of the presidency with absolute immunity.[158] Although noting that the Court's separation of powers

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[148] *Id.* at 749–50.

[149] *Fitzgerald*, 457 U.S. at 750.

[150] *Id.*

[151] *See id.* at 755–56.

[152] *See id.*

[153] *See id.* at 753–54.

[154] *See Fitzgerald*, 457 U.S. at 754. This test was first articulated in *United States v. Nixon* and later reaffirmed in *Nixon v. Adm'r of Gen. Servs.* *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 711–13 (1974).

[155] *Fitzgerald*, 457 U.S. at 754. Chief Justice Burger also wrote a concurring opinion to emphasize that absolute presidential immunity was based on constitutional principles. *Id.* at 758–64 (Burger, C.J., concurring). For Burger, the separation of powers doctrine mandated absolute presidential immunity, as the independent functioning of the executive branch relied on not having the President subject to civil suits for damages. *See id.* at 758–61.

[156] *Id.* at 766 (White, J., dissenting).

[157] *See id.* at 769.

[158] *Id.* at 770.

balancing test[159] does not draw a bright line between the constitutional principle of separation of powers and public policy,[160] the dissenting justices concluded that the Court should have focused on whether civil liability would have prevented the President from "accomplishing [his] constitutionally assigned functions."[161] Given that the personnel decisions involved in *Fitzgerald* were not constitutionally assigned presidential functions, the dissenting justices concluded that subjecting the President to civil suit would not have violated the separation of powers doctrine.[162]

2. Reasserting Qualified Immunity—*Harlow v. Fitzgerald*

Announced the same day as *Fitzgerald*, the Supreme Court's decision in *Harlow v. Fitzgerald* further refined the Court's executive immunity jurisprudence.[163] Involving the same plaintiff and same constitutional violations as those in *Nixon v. Fitzgerald*, the case examined the level of immunity that should be granted to senior presidential aides and advisors in civil suits for damages.[164] The Court observed that it had previously extended absolute immunity to certain officials in the executive branch,[165] but it emphasized that "for executive officials in general . . . qualified immunity represents the norm."[166] The Court stressed that the importance and proximity of presidential aides to the President was not sufficient to justify absolute immunity.[167] Employing a functional analysis, the Court concluded that a claim of absolute immunity cannot rest on the "mere fact of high station," but by "reference

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[159] *See supra* note 154.

[160] *Fitzgerald*, 457 U.S. at 779 (White, J., dissenting).

[161] *Id.* at 780.

[162] *See id.* 788. Although absolute immunity was not justified in *Fitzgerald*, the dissenting opinion did hold open the possibility that under the Court's functional immunity analysis, the President could still be granted absolute immunity. *See id.* at 791. If the functions for which the President is constitutionally responsible were substantially impaired by the prospect of civil liability, then a court would be justified in granting the President absolute immunity. *See id.*

[163] *See Harlow*, 457 U.S. at 802.

[164] *Id.*

[165] *See id.* at 807. As the Court noted, these officials include prosecutors and similar officials, executive officers engaged in adjudicative functions, and the President of the United States. *Id.*

[166] *Id.*

[167] *Id.* at 808–09. The Court noted that it would be inappropriate to grant presidential aides absolute immunity when it had previously declined to extend absolute immunity to the Secretary of Agriculture in *Butz*. *See id.* at 809.

to the public interest in the special functions" of the official's office.[168] The Court also rejected a claim for derivative immunity similar to that granted to congressional aides.[169]

One of the most significant aspects of the Court's decision was its reformulation of the qualified immunity standard by removing the malicious intent requirement.[170] In 1975 in *Wood v. Strickland*,[171] the Court added a subjective component to the qualified immunity standard, requiring that officials claiming immunity not act with a malicious intent.[172] The *Harlow* Court noted that such subjective inquiries in the form of trial or discovery requests carried with them great costs.[173] In eliminating this subjective malice requirement, the Court held that officials were shielded from liability for civil damages if their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[174] If a law was clearly established, an official could not claim any form of immunity, as the Court would assume that the official was aware or should have been aware of the relevant legal standard.[175]

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[168] *Harlow*, 457 U.S. at 812. Although the Court suggested in dicta that aides performing sensitive national security or foreign policy functions might be able to claim absolute immunity, the court was clear that qualified immunity was the norm for almost all executive officials. *See id.* at 812 & n.19. In 1985, in *Mitchell v. Forsyth*, the Supreme Court in a 4–3 decision rejected a claim by the Attorney General for absolute immunity for acts performed in the exercise of his national security functions. *See* 472 U.S. 511, 520 (1985).

[169] *See Harlow*, 457 U.S. at 810. In a dissenting opinion, Chief Justice Burger strongly criticized the Court's unwillingness to extend derivative immunity to senior presidential aides. *Id.* at 822 (Burger, C.J., dissenting) ("I am at a loss, however, to reconcile this conclusion with our holding in *Gravel v. United States.*"); *see also* Gravel v. United States, 408 U.S. 606 (1972); Kathryn Dix Sowle, *The Derivative and Discretionary-Function Immunities of Presidential and Congressional Aides in Constitutional Tort Action*, 44 OHIO ST. L.J. 943, 955–76 (1983) (criticizing the *Harlow* Court's poorly rationalized discussion on derivative immunity and discretionary function).

[170] *See Harlow*, 457 U.S. at 818.

[171] *See* 420 U.S. at 322; *supra* note 130.

[172] *See Harlow*, 457 U.S. at 815–18.

[173] *See id.* at 816–17. The Court also noted that in the case of presidential aides, establishing the subjective intent of the officials claiming immunity through broad discovery requests could involve complex separation of powers concerns. *See id.* at 817 n.28.

[174] *Id.* at 817–18.

[175] *Id.* at 818–19. In a concurring opinion, Justice Brennan stressed that the Court's holding established that an official who knowingly violates the law cannot escape liability: "Thus the clever and unusually well-informed violator of constitutional rights will not evade just punishment for his crimes." *Id.* at 821 (Brennan, J., concurring).

3. Denying Absolute Immunity for National Security Functions—*Mitchell v. Forsyth*

In 1985, the Court in *Mitchell v. Forsyth* further limited the scope of absolute immunity by holding that the Attorney General's national security function in authorizing a warrantless wiretap did not justify a grant of absolute immunity.[176] Refusing to apply blanket immunity to those carrying out important and sensitive national security duties, the Court applied a functional analysis in looking at three key factors.[177] First, the Court noted that there was no historical or common-law basis for granting absolute immunity to those carrying out national security functions.[178] The Court next observed that national security functions, although extremely sensitive, are carried out in secret and thus not subject to the same hazards of engendering "vexatious litigation" as prosecutorial and judicial duties.[179] Finally, the Court stressed that unlike other government officials who have been granted absolute immunity, the Attorney General is not subject to electoral or institutional checks that would rectify abuses of power.[180] By foreclosing the possibility that presidential aides or senior executive officials could claim absolute immunity by virtue of their important national security functions, the Court confirmed that even those officials within the President's innermost circle were only entitled to qualified immunity.[181]

4. Refining Absolute Presidential Immunity—*Clinton v. Jones*

In 1997, in *Clinton v. Jones*, the Court addressed the uncertain question of whether a sitting President could claim temporary immunity from a civil suit for actions taken prior to becoming President.[182] Paula Jones, a former Arkansas state employee, brought common law tort and constitutional claims against then-President Bill Clinton stemming from an incident in 1991 when Bill Clinton was still Governor of Arkansas.[183]

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[176] *See* 472 U.S. at 520. The Court concluded that the Attorney General was protected by qualified immunity, as the legality of his actions was still an open question when he acted. *See id.* at 535.

[177] *See id.* at 521–23.

[178] *Id.* at 521.

[179] *See id.* at 521–22; *see also infra* notes 266–269 and accompanying text. The Court strongly emphasized this point despite recognizing that the Attorney General had pending lawsuits related to his national security functions. *See Forsyth*, 472 U.S. at 522 n.6.

[180] *See Forsyth*, 472 U.S. at 522–23.

[181] *See id.* at 521.

[182] 520 U.S. 681, 684 (1997).

[183] *See id.* at 684–86.

Noting its continued support for the general proposition in *Fitzgerald* that the President was absolutely immune from civil suits arising out actions taken in the "outer perimeter" of the President's duties,[184] the Court concluded that such reasoning was inapplicable to the President's *unofficial* conduct.[185]

The Court reasoned that absolute presidential immunity was only appropriate for the President's official conduct because the underlying concern in *Fitzgerald* was that the President might be unduly cautious in the exercise of his official duties.[186] Ensuring that the President's decision-making process was not distorted by fear of civil liability demanded only the extension of immunity to the President's official acts.[187] The Court also rejected President Clinton's claims that because the *Fitzgerald* Court had based its decision on concerns over the "diversion of [the President's] energies,"[188] *any* civil liability for damages for a sitting President would damage the effective functioning of the executive branch.[189]

The Court also rejected President Clinton's claims that separation of powers principles required a grant of temporary immunity to a sitting President.[190] In a broad and somewhat disjointed review of the Court's separation of powers jurisprudence, the Court asserted that separation of powers principles did not preclude the judiciary from exercising jurisdiction over the President.[191] Although the Court did acknowledge that the office of the President occupies a "unique posi-

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[184] *Id.* at 694.

[185] *See id.*

[186] *Id.* at 693–94.

[187] *See Clinton*, 520 U.S. at 694.

[188] *Fitzgerald*, 457 U.S. at 751.

[189] *See Clinton*, 520 U.S. at 694 n.19. The Court considered these concerns raised in *Fitzgerald* to be dicta. *See id.*

[190] *Id.* at 699. Justice Breyer wrote an opinion concurring in the judgment, suggesting that a President could successfully argue for temporary immunity. *See id.* at 710–24 (Breyer, J., concurring in the judgment). For Justice Breyer, the Court's grant of absolute immunity to President Nixon in *Fitzgerald* was based on the concern that lawsuits could both *distort* a President's official decision making and *distract* the President from those official duties. *See id.* at 720. Many commentators have been critical of the Supreme Court's decision in *Clinton*, particularly in its failure to properly acknowledge how diverting the President's energies and attention to lawsuits might damage the functioning of the executive branch. *See* Amar & Katyal, *supra* note 106, at 713–14; Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1755 (1998).

[191] *See Clinton*, 520 U.S. at 703–05 (citing *Nixon*, 418 U.S. at 683; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d)).

tion in the constitutional scheme,"[192] the Court concluded that its exercise of power over the President would not impair the President in the performance of his constitutional duties.[193] Writing the majority opinion a year before the impeachment of President Clinton,[194] Justice Stevens thus observed without a trace of irony: "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. . . . [I]t appears to us highly unlikely to occupy any substantial amount of petitioner's time."[195]

III. The Vice President's Amenability to Criminal Proceedings

As noted above, the Court's unwillingness to subject the President to civil liability for money damages for his official acts demonstrates the Court's concern that liability would disrupt the political and constitutional power of the executive branch.[196] The history of the vice presidency, however, demonstrates that similar concerns have not precluded courts from subjecting a sitting Vice President even to criminal proceedings.[197] The criminal charges filed against Aaron Burr and Spiro Agnew illustrate that courts have long considered it appropriate to exercise some power over a sitting Vice President in criminal proceedings.[198] In the case of Vice President Spiro Agnew, the executive branch itself weighed in on the issue by explicitly arguing that the Vice President was not entitled to any type of immunity in criminal proceedings.[199] Although criminal liability involves different interests and con-

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[192] *Clinton*, 520 U.S. at 698 (quoting *Fitzgerald*, 457 U.S. at 749).

[193] *Id.* at 705–06.

[194] For an overview of the impeachment of President Clinton by the House of Representatives and the investigation leading up to it, see Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 Hastings Const. L.Q. 161, 273–300 (2007).

[195] *Clinton*, 520 U.S. at 702. Although the Court rejected President Clinton's argument that the Constitution required a grant of immunity from civil suits for money damages to a sitting President, it also suggested that the Constitution did not necessarily preclude such a grant. *See id.* at 709–10. The Court suggests that Congress had the power to enact statutory immunity for the President in deterring civil litigation for a sitting President. *See id.*; *see also* Diann D. Alexander, Comment, *In the Aftermath of* Clinton v. Jones*: An Argument in Favor of Legislation Permitting a Sitting President to Defer Litigation*, 28 Sw. U. L. Rev. 71, 71–72 (1998).

[196] *See* Clinton v. Jones, 520 U.S. 681, 694 (1997).

[197] *See* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, NEXUS, Spring 1997, at 11, 15–16; Eric M. Freedman, *The Law as King and the King as Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 Hastings Const. L.Q. 7, 22–24 (1992).

[198] *See* Amar & Kalt, *supra* note 197, at 15–16; Freedman *supra* note 197, at 22–24.

[199] *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity at 4, *In re* Proceedings of the Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. Oct. 5, 1973) [hereinafter Bork Memo]; *see also* Memorandum from

cerns than civil liability, this historical precedent is still useful in analyzing the Vice President's potential personal liability for civil claims.[200] The willingness of courts to subject sitting Vice Presidents to criminal process, despite the resulting disruption to the executive branch, informs the analysis of the potential separation of powers and political concerns involved in subjecting the Vice President to civil liability for money damages.[201]

A. *Historical Precedent for Criminal Liability: Aaron Burr's Indictment for Murder*

The vice presidency of Aaron Burr was controversial from the start, but no moment was as contentious or notorious as his duel with Alexander Hamilton in 1804.[202] As a result of its fatal outcome, Vice President Burr was indicted for murder in New York and New Jersey.[203] Although the murder charges in New Jersey were eventually dropped when Burr's political allies gained control of the New Jersey governorship, a grand jury in New York charged Burr with the misdemeanor of participating in a duel.[204] Instead of directly facing the pending charges in either New York or New Jersey, Burr returned to Washington, D.C., to serve out the rest of his term as Vice President, most prominently by presiding over the impeachment trial of Supreme Court Justice Samuel Chase.[205] Although the criminal indictments hanging over Burr's head were a source of embarrassment for Burr and political fodder for his

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Robert G. Dixon, Jr., Assistant Att'y Gen., Off. of Legal Couns., on Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office 40 (Sept. 24, 1973), *available at* http://www.fas.org/irp/agency/doj/olc/092473.pdf.

[200] *See* Nixon v. Fitzgerald, 457 U.S. 731, 754 n.37 (1982). The fact that Vice President Aaron Burr did not invoke any type of common law claim for vice presidential immunity, particularly so soon after the adoption of the Constitution, suggests that no such historical claim existed. *See* Freedman, *supra* note 197, at 23 & n.53; *see also* Mitchell v. Forsyth, 472 U.S. 511, 521 (1985). As the *Forsyth* Court observed, the lack of a historical or common-law basis for immunity is a factor weighing against a grant of absolute immunity in civil suits for money damages. *See Forsyth*, 472 U.S. at 521.

[201] *See infra* notes 247–260 and accompanying text.

[202] *See* THOMAS FLEMING, DUEL: ALEXANDER HAMILTON, AARON BURR, AND THE FUTURE OF AMERICA 321–31 (2000) (recounting the duel between Hamilton and Burr); Albert, *supra* note 24, at 837–39.

[203] *See* Freedman, *supra* note 197, at 22.

[204] *See* FLEMING, *supra* note 202 at 355, 357. The grand jury in New York decided to drop the murder charge against Burr because Hamilton was actually shot in New Jersey. *See id* at 355.

[205] *See id.* at 359–60.

enemies,[206] Burr was seemingly not impaired in carrying out his duties as Vice President.[207] In addition, Burr never asserted that a sitting Vice President was immune from criminal prosecution, and he even considered surrendering to the authorities in New York.[208]

B. *The Indictment of Spiro Agnew*

1. Plea of *Nolo Contendere*

The vice presidency of Spiro Agnew was also marred by accusations of criminal wrongdoing.[209] As a result of a more general federal inquiry into political corruption in Maryland, the Department of Justice in 1973 announced that Vice President Agnew was under investigation for conspiracy, extortion, bribery, and tax fraud.[210] After significant political wrangling and negotiation with the Department of Justice, Agnew eventually resigned as Vice President and entered a plea *nolo contendere* to federal income tax evasion on October 10, 1973.[211] As a result, he avoided formal indictment and trial.[212]

Unlike Aaron Burr, however, Agnew explicitly resisted the criminal charges filed against him by attempting to enjoin a grand jury from even hearing evidence in his case.[213] Arguing that separation of powers concerns counseled against subjecting him to criminal liability, Agnew asserted that a sitting Vice President was immune from criminal proceedings.[214] In response to Agnew's assertion of vice presidential immunity, Solicitor General Robert Bork filed a brief in the same court arguing that unlike the President of the United States, the Constitution does

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[206] *See* RON CHERNOW, ALEXANDER HAMILTON 715–16 (2004).

[207] *See* Freedman, *supra* note 197, at 24.

[208] *See id.* at 22.

[209] *See* JOHN FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATION 117–24 (1992). *See generally* RICHARD M. COHEN & JULES WITCOVER, A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW (1974) (recounting the legal and political developments surrounding Vice President Agnew's plea of *nolo contendere* and resignation from office).

[210] *See* COHEN & WITCOVER, *supra* note 209, at 130–36; FEERICK, *supra* note 209, at 119.

[211] *See* FEERICK, *supra* note 209, at 124.

[212] *See id.*

[213] *See* COHEN & WITCOVER, *supra* note 209, at 257–58.

[214] *See* Memorandum in Support of Motion to Bar Grand Jury Action at 11, *In re* Proceedings of the Grand Jury Impaneled Dec. 5, 1972, No. 73-965 (D. Md. Sept. 28, 1973) [hereinafter Agnew Memo].

not afford a sitting Vice President immunity from criminal proceedings.[215]

2. Establishing the Vice President's Criminal Liability

In concluding that Vice President Agnew had no constitutional basis to claim immunity from criminal suit, the Department of Justice, through the OLC and the Office of the Solicitor General, was careful to distinguish the constitutional positions of President and Vice President.[216] Citing Vice President Aaron Burr's indictment for murder, both the OLC and the Office of the Solicitor General argued that Burr's ability to carry out the responsibilities of his office while indicted suggested that criminal liability does not effect the Vice President's removal from office.[217] Similarly, the limited constitutional functions of the Vice President are of such lesser importance that the nation arguably does not depend on the Vice President for the "orderly operation of government," as evidenced by the frequent vacancy of the vice presidency in the nineteenth century.[218] According to the OLC and the Office of the Solicitor General, the Vice President does not have a claim for criminal immunity because the Vice President's constitutional functions are so minor that they are not substantially impaired by legal liability.[219]

In contrast to the case of the Vice President, the OLC and the Office of the Solicitor General maintained that the President's immunity from criminal process is compelled by the structure of the Constitution.[220] Given that all executive power is vested in the President, the personal incapacity of the President through criminal indictment would

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[215] Bork Memo, *supra* note 199, at 2. In a memorandum drafted two weeks earlier, the OLC came to the similar conclusion that the Vice President could not claim immunity from criminal prosecution. *See* Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 40.

[216] *See* Bork Memo, *supra* note 199, at 17–21; Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 34, 40.

[217] *See* Bork Memo, *supra* note 199, at 12; Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 33.

[218] *See* Bork Memo, *supra* note 199, at 18; Michael Nelson, *History of the Vice Presidency*, *in* CONGRESSIONAL QUARTERLY'S GUIDE TO THE PRESIDENCY 131, 134 (Michael Nelson ed., 1989) (noting that the vice presidency was essentially vacant from July 1850 to March 1857).

[219] *See* Bork Memo, *supra* note 199, at 13; Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 35–37.

[220] *See* Bork Memo, *supra* note 199, at 17, 18; Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 28.

seemingly impair the functioning of an entire branch of government.[221] As this impairment would violate the separation of powers doctrine, a sitting President would have to be removed from office by impeachment and conviction by Congress before being subject to criminal process.[222] Ultimately for the OLC and the Office of the Solicitor General, the President's "unique constitutional position and powers" required excluding a sitting President from criminal process.[223] In terms of immunity, at least, the OLC and the Office of the Solicitor General saw the President and the Vice President as clearly distinct.[224] Although there has been no judicial resolution of the President's or Vice President's amenability to criminal suit, as Spiro Agnew pleaded *nolo contendere* and as President Richard Nixon was not indicted in the Watergate affair, the OLC did issue a memorandum in 2000 reaffirming its earlier analysis from 1973.[225]

IV. Understanding the Vice President's Limited Functions: The General Inapplicability of Absolute Immunity

Although the Supreme Court has not yet placed the vice presidency within its immunity jurisprudence, its previous executive immunity decisions suggest that the Vice President would fail in asserting absolute immunity under the Court's functional analysis.[226] The Court's articulation of absolute immunity for the President is ultimately inapplicable to the Vice President because the Court's reliance on the President's unique constitutional status reflects concerns over the distribution of power under Article II, not the office's political prominence.[227] Likewise, a more functional analysis of the Vice President's specific duties indicates that the Vice President is not responsible for the types of sensitive and prominent decisions that typically generate litigation and thus justify a grant of absolute immunity.[228] The Vice President might be able to claim some limited form of legislative immunity, but would likely be

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[221] *See* Bork Memo, *supra* note 199, at 18; Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 29.

[222] *See* Bork Memo, *supra* note 199, at 17.

[223] *Id.* at 7.

[224] *See id.* at 18; Memorandum from Robert G. Dixon, Jr., *supra* note 199, at 40.

[225] *See* Memorandum from Randolph D. Moss, Assistant Att'y Gen., Off. of Legal Couns., on A Sitting President's Amenability to Indictment and Criminal Prosecution 1 (Oct. 16, 2000), *available at* http://www.usdoj.gov/olc/sitting_president.htm.

[226] *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 698–99 (1997); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982); *infra* notes 231–303 and accompanying text.

[227] *See Fitzgerald*, 457 U.S. at 749–50.

[228] *See* Mitchell v. Forsyth, 472 U.S. 511, 521–22 (1985).

precluded from asserting such protection in most cases.[229] Despite being unable to claim absolute immunity in civil suits for money damages, the Vice President would still be granted qualified immunity in most instances, thus receiving adequate protection commensurate with the actual functions performed by the Vice President.[230]

A. *The Vice President's Constitutional Status Does Not Justify a Grant of Absolute Immunity*

The Vice President would fail in asserting that his constitutional status warrants a grant of absolute immunity.[231] Although the extent to which absolute presidential immunity is mandated by constitutional considerations is unclear,[232] the Supreme Court relies heavily on the President's unique constitutional status to justify absolute immunity.[233] In focusing so heavily on the President's constitutional status in its functional approach, the Court, in *Nixon v. Fitzgerald* was guided by the fact that Article II vests all executive power in the President.[234] Because the President's functions are so sweeping and singular, the Court concluded that it would be problematic to distinguish between the President's con-

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[229] *See infra* notes 304–318 and accompanying text.

[230] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[231] *See Fitzgerald*, 457 U.S. at 749.

[232] *See id.* at 760 (Burger, C.J., concurring) (noting that the majority opinion did not adequately articulate the constitutional basis of the President's absolute immunity).

[233] *See Clinton*, 542 U.S. at 698–99 ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Office of the President] occupies." (quoting *Fitzgerald*, 457 U.S. at 749)); *Fitzgerald*, 457 U.S. at 749 (noting that absolute immunity is "a functionally mandated incident of the President's unique office").

[234] *See* 457 U.S. at 749–50. The structure of Article II envisions the President as a unitary executive, but there remains a great deal of debate as to the extent and intent of the framers in asserting a unitary executive. *See* Lawrence Lessing & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8 (1994) ("No one denies that in some sense the framers created a unitary executive; the question is in what sense."); Peter L. Strauss, 75 GEO. WASH. L. REV. 696, 696 (2007) ("All will agree that the Constitution creates a unitary chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail. Disagreement arises over what his function entails."). *Compare* Lessig & Sunstein, *supra*, at 9 (advocating for a weak version of the unitary executive), *and* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1350–66 (1994) (rejecting the contention that the Vesting Clause grants the President absolute control over the executive branch), *with* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550 (1994) ("[T]he originalist textual and historical arguments for the unitary Executive, taken together, firmly establish the theory."), *and* Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 604–05 (2005) (arguing for a strong version of the unitary executive).

stitutional office and functions.[235] As a result, it was necessary to protect all acts within the "outer perimeter" of the President's official responsibility.[236] Functionalism and formalism thus overlap in the Court's conception of absolute presidential immunity, but the Court is clear that the President is distinct in this respect: "The President's unique status under the Constitution distinguishes him from other executive officials."[237] In reviewing any claim of vice presidential absolute immunity under the standard articulated in *Fitzgerald*, a court would have to first acknowledge that the *Fitzgerald* Court's willingness to broadly protect the President is not so much a protection of the office itself, but more an incident of the distribution of executive power under Article II.[238]

It is true that the Vice President holds a unique and prominent office under the Constitution, but unlike the presidency, this distinct constitutional office does not preclude the Court from applying its more traditional functional approach.[239] Under this approach, neither proximity to the President nor prominence within the executive branch is enough alone to justify a grant of absolute immunity.[240] As the Court noted in 1985, in *Mitchell v. Forsyth*, a grant of absolute immunity cannot be based on an official's status and position within the executive branch, but rather must rest on the nature of the functions performed by the official.[241] Although the vice presidency is perhaps not the "constitutional luxury" that some commentators have suggested,[242] it remains clear that the Vice President's primary duties within the executive branch are to serve as the President's designated successor and as a presidential advisor.[243] As the President's designated successor and a nationally elected official, the Vice President clearly occupies a constitutional status distinct from that of other executive officials.[244] This unique constitutional status, however, is largely a result of historical and political ambivalence, and not the product of the constitutional structuring of executive power, as is the case with the President.[245] Any claim

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[235] *Fitzgerald*, 457 U.S. at 756.

[236] *Id.*

[237] *Id.* at 750.

[238] *See supra* notes 234–235 and accompanying text.

[239] *See Clinton*, 520 U.S. at 694–95.

[240] *See Harlow*, 457 U.S. at 808–09.

[241] *See* 472 U.S. at 521.

[242] Amar & Kalt, *supra* note 197, at 16.

[243] *See* U.S. CONST. art. II, § 1, cl. 6 & amend. XXV; *supra* notes 67–72 and accompanying text.

[244] *See supra* notes 36–40, 61–66 and accompanying text.

[245] *See* U.S. CONST. art. II, § 1; *see also supra* notes 234–238 and accompanying text.

that the Vice President's constitutional status supports a grant of absolute immunity akin to that given to the President would thus misconstrue the Court's purpose in highlighting the President's constitutional position.[246]

The Court's justification for absolute presidential immunity is based largely on separation of powers concerns implicated by the President's unique constitutional status.[247] In considering exercising jurisdiction over the President for a mere private suit for damages, the Court in *Fitzgerald* cited the separation of powers doctrine in counseling restraint.[248] These constitutional considerations, however, are ultimately inapplicable to the functions and office of the Vice President.[249] Whereas the structure of Article II suggests that the President's personal liability could impair the functioning of the entire executive branch, the constitutional order envisioned by Article II would be no more threatened by the personal liability of the Vice President than by the liability of any other senior executive official.[250] The Court in *Forsyth* clearly asserted that civil suits against senior executive officials do not raise comparable separation of powers concerns: "[T]he considerations of separation of powers that call for absolute immunity for state and federal legislators and for the President of the United States do not demand a similar immunity for Cabinet officers or other high executive officials."[251] The Court thus employs separation of powers concerns to help draw a line within much of its executive immunity jurisprudence.[252]

The Court's 2004 decision in *Cheney v. U.S. District Court for the District of Columbia*, however, must be taken into account in evaluating the Vice President's immunity claims.[253] In *Cheney*, the Court suggested that similar separation of powers considerations attach to confidentiality claims by the President and the Vice President.[254] It is crucial to note,

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[246] *See supra* notes 234–238 and accompanying text.

[247] *See supra* notes 234–238 and accompanying text.

[248] *See* 457 U.S. at 749–50. Although acknowledging that the separation of powers doctrine does not bar every exercise of jurisdiction over the President, the Court noted: "Courts have traditionally recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Id.*

[249] *See Forsyth*, 472 U.S. at 521.

[250] *See supra* notes 202–215 and accompanying text; *see also Forsyth*, 472 U.S. at 511 (granting the Attorney General qualified immunity); *Harlow*, 457 U.S. at 800 (granting presidential aides qualified immunity); Butz v. Economou, 438 U.S. 478, 507 (1978) (granting Cabinet members qualified immunity).

[251] 472 U.S. at 521.

[252] *See id.*

[253] *See* 542 U.S. 367, 382, 390 (2004).

[254] *See id.*; *see also supra* note 102 and accompanying text.

however, that *Cheney* involved claims of executive *privilege*, not executive immunity.[255] Whereas executive privilege casts a wide net to enable the President to carry out his constitutional duties by protecting the confidentiality of presidential communications, absolute executive immunity protects the exercise of special functions performed by an individual official.[256] The *Cheney* Court's inclusion of the Vice President in its discussion of separation of powers concerns was partly an effort to ease the executive branch's burden in maintaining confidential communication by not requiring it to invoke executive privilege in every civil suit.[257] In addition, the *Cheney* Court's concern that civil litigation might involve overly broad discovery requests would seem to counsel limiting the scope of discovery, not precluding civil liability altogether.[258] Without any explanation as to how the functioning of the executive branch is tied up in the person and office of the Vice President, though, these separation of powers concerns do not seem applicable to the Court's executive immunity analysis.[259] Ultimately, the fact that Article II vests no power in the Vice President means that the separation of powers considerations so central in the Court's justification of absolute immunity for the President are somewhat irrelevant for the Vice President.[260]

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[255] *See* 542 U.S. at 388. For an overview of executive privilege, see Kitrosser, *supra* note 10, at 496–510.

[256] *See* Geldert, *supra* note 10, at 833; *see also* United States v. Nixon, 418 U.S. 683, 705–06 (1974). Although the term "executive privilege" has been used loosely to encompass presidential communicative privilege, avoidance of judicial pressure to perform discretionary functions, and immunity from civil liability, the Court's articulation of executive privilege in *Nixon* is recognized as referring to the confidentiality of presidential communications. *See* Geldert, *supra* note 10, at 833; *see also Nixon*, 418 U.S. at 705–06. Executive immunity as applied to the President in *Fitzgerald* is understood as immunity from civil suits for money damages stemming from the President's official actions. *See* 457 U.S. at 749.

[257] *See Cheney*, 542 U.S. at 385 ("The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. . . . [S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated."). *But see* Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 213 (2008) (asking why the President's confidentiality interest and autonomy would be threatened by forcing the Vice President to invoke executive privilege).

[258] *See* 542 U.S. at 385–86. The Court essentially endorsed this position in *Clinton*: "The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." 520 U.S. at 707.

[259] *See supra* notes 234–238 and accompanying text.

[260] *See Clinton*, 520 U.S. at 712–13 (Breyer, J., concurring in the judgment).

B. *The Vice President's Specific Functions Do Not Generally Justify a Grant of Absolute Immunity*

1. The Vice President's Advisory Functions

The Vice President's claims for absolute immunity are also unpersuasive in regards to the Vice President's specific function as an advisor to the President, particularly given the Court's more general justification for absolute immunity.[261] Under its functional approach, the Court views absolute immunity generally as a means to ensure that officials performing "especially sensitive duties"[262] do so fearlessly and impartially.[263] The assumption is that an official's fear of personal liability will distort his or her decisions and interfere with the functioning of the office.[264] In the case of the President, the Court has sought to prevent the President from being "unduly cautious" in carrying out his special functions, which are "the most sensitive and far-reaching decisions to any official under our constitutional system."[265] Similarly, the Court's limited grant of absolute immunity to prosecutors and judges is based on the special judicial and prosecutorial functions they carry out within the judicial process.[266] Like those of the President, these special functions deal with matters "likely 'to arouse the most intense feelings'"[267] and carry substantial risks of entangling these officials in "vexatious litigation."[268] It is thus in reference to the special and sensitive functions actually performed by an official that the Court justifies a grant of absolute immunity to a particular executive official.[269]

The Vice President's advisory function would not merit the protection of absolute immunity because the Vice President's impartiality as

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[261] *See* Ferri v. Ackerman, 444 U.S. 193, 203–04 (1979) ("The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.").

[262] *Fitzgerald*, 457 U.S. at 746.

[263] *See Clinton*, 520 U.S. at 693.

[264] *See id.* at 720 (Breyer, J., concurring in the judgment).

[265] *Fitzgerald*, 457 U.S. at 752 & n.32.

[266] *See Butz*, 438 U.S. at 508–12, 513–17. Prosecutors are granted absolute immunity for prosecutorial acts, but only qualified immunity for administrative and investigative acts. *See* Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976). Judges receive absolute immunity for their judicial tasks and qualified immunity for administrative acts. *See* Forrester v. White, 484 U.S. 219, 228–30 (1988).

[267] *Fitzgerald*, 457 U.S. at 752 (quoting Person v. Ray, 386 U.S. 547, 554 (1967)).

[268] *See Forsyth*, 472 U.S. at 521–22.

[269] *See Harlow*, 457 U.S. at 807. Apart from the President, whose constitutional status is taken into account, every executive official must base his or her claim of absolute immunity on the special functions he or she performs. *See id.*

an advisor would not be affected by liability, nor does the role itself invite litigation.[270] The Vice President may very well be the President's most trusted advisor, but there is no reason to believe that the Vice President would be any less candid in giving advice if subject to liability than other presidential aides or Cabinet members would be.[271] In addition, unlike other executive officials to whom absolute immunity has been extended, the Vice President does not perform any judicial or prosecutorial functions in this advisory role.[272] As a result, the Vice President does not constantly interact with litigious and disgruntled parties as do judges and prosecutors, nor is the Vice President solely responsible for prominent decisions that arouse intense public reaction as is the President.[273] Although the political prominence of the Vice President might make him a target for lawsuits, the Court's concern is with people's reaction to intensely sensitive public decisions, not their general antipathy to prominent officials.[274] The Court's designation of certain functions as "special" is thus not an indication of their importance or prominence alone, but rather a judgment that such functions place particular officials at greater risk of being subject to civil suits for money damages.[275] The advisory and rather private nature of the Vice President's function within the executive branch suggests that a court would not regard such actions as "special functions."[276]

Given the recent history of Vice President Cheney's prominent and crucial role in national security decisions, it is possible that a Vice President may claim that his national security functions justify a grant of absolute immunity.[277] The Court's decision in *Forsyth* strongly suggests that

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[270] *See Forsyth*, 472 U.S. at 521–22; *supra* notes 46–51, 67–72 and accompanying text.

[271] *See Harlow*, 457 U.S. at 809 (holding that presidential aides are entitled only to qualified immunity). In reflecting on its decision in *Butz*, the *Harlow* Court noted that it does not "doubt the importance to the President of loyal and efficient subordinates in executing his duties of office." *Id.* at 808–09.

[272] *See supra* notes 35–72 and accompanying text.

[273] *See Fitzgerald*, 457 U.S. at 752; *supra* notes 35–44, 67–72 and accompanying text.

[274] *See Fitzgerald*, 457 U.S. at 752–53. It is true that the Court has considered the prominence of the President's office a factor supporting absolute immunity, but the President's politically prominent office is inseparable from the special functions entrusted to the President under Article II. *See id.* The functional and practical significance of the President's prominent office makes any comparison with the Vice President's office inapt. *See supra* notes 239–267 and accompanying text.

[275] *See Butz*, 438 U.S. at 508.

[276] *See Fitzgerald*, 457 U.S. at 752.

[277] *See* Walsh, *supra* note 73, at 26.

such a claim by a Vice President would also fail.[278] Unlike the Attorney General, who is statutorily authorized to make such sensitive national security decisions,[279] the Vice President's national security functions are essentially advisory.[280] Because the Vice President is not responsible for making sensitive and prominent national security decisions, it is highly unlikely that a court would consider the Vice President's national security functions as "special functions" demanding the protection of absolute immunity.[281] In essence, there are no sensitive decisions for the Vice President to make, and thus no concern that liability will distort the effective functioning of the office.[282] In addition, there is no historical or common-law basis for Vice Presidents receiving absolute immunity for their national security functions.[283] Ultimately, courts have been unwilling to extend absolute immunity to those performing national security functions because of the need to restrain abuses of powers[284] and because the constitutional and political accountability for such decisions are assigned to the President alone.[285]

2. The Vice President's Constitutional Functions

In addition to the Vice President's advisory functions, the Vice President has an important constitutional function under the Twenty-Fifth Amendment as the President's designated successor.[286] Given the

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[278] *Cf.* 472 U.S. at 520 ("We conclude that the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.").

[279] *See* 18 U.S.C. § 2511(2)(a)(ii)(B) (2006).

[280] *See* 50 U.S.C. § 402(a) (2000). The Vice President serves on the National Security Council, but the Council's function is simply to advise the President on national security issues. *See id.* The particular role played by Vice President Cheney in the administration of President George W. Bush perhaps blurs the distinction between advisory and operational functions, but the standard set forth in *Forsyth* would make such a fact immaterial in a court's functional analysis of the Vice President's immunity claims. *See* 472 U.S. at 520.

[281] *See Fitzgerald*, 457 U.S. at 752.

[282] *See Clinton*, 520 U.S. at 720 (Breyer, J., concurring in the judgment).

[283] *See Forsyth*, 472 U.S. at 521. That the Vice President had almost no national security functions prior to the mid-twentieth century undermines any attempt to ground such an immunity claim in history. *See supra* note 48 and accompanying text. As the third Vice President for Franklin D. Roosevelt, Harry Truman had been unaware that the United States even possessed atomic weapons, a fact that led him to include the Vice President as a permanent member on the National Security Council. *See* Albert, *supra* note 24, at 832–33.

[284] *Forsyth*, 472 U.S. at 523 ("The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.").

[285] *See Clinton*, 520 U.S. at 713 (Breyer, J., concurring in the judgment).

[286] *See* U.S. CONST. amend. XXV, §§ 1, 3–4; *see also supra* notes 36, 61–66 and accompanying text.

importance of being prepared to assume the presidency at any moment, a Vice President could assert that absolute immunity is necessary to protect this function and ensure the effective functioning of the executive branch.[287] Again, this claim for absolute vice presidential immunity would confront the Court's understanding and articulation of absolute immunity as a necessary protection for officials in carrying out particularly sensitive and prominent functions from which litigation is likely to result.[288] The Vice President's constitutional duty as the President's designated successor does not involve a sensitive decision likely to arouse intense feeling, and thus it would likely not be construed as a "special function" necessitating protection under the Court's immunity jurisprudence.[289] In fact, given that this constitutional duty involves the performance of no function—other than succession to the presidency itself—the underlying principle of absolute immunity in protecting officials in performing sensitive duties would be inapplicable.[290] The Court would thus likely reject any claim that the Vice President's constitutional status under the Twenty-Fifth Amendment justifies a grant of absolute immunity as being inapposite to the Court's functional analysis of the President's unique constitutional position.[291]

The Vice President could also argue that in addition to the threat of personal liability, actual participation in civil litigation would distract the Vice President from carrying out this duty.[292] The Court's 1997 decision in *Clinton v. Jones* casts serious doubts on such a claim, however,

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[287] *See Clinton*, 520 U.S. at 693.

[288] *See Fitzgerald*, 457 U.S. at 746.

[289] *See supra* notes 271–276.

[290] *See Ferri*, 444 U.S. at 203–04. Although the Vice President does not perform any active function as the President's designated successor, the Vice President does have a significant role in determining presidential inability under Section 4 of the Twenty-Fifth Amendment. *See* U.S. CONST. amend. XXV, §§ 1, 4. It is possible that a court might consider that decisions made by the Vice President pursuant to Section 4 of the Twenty-Fifth Amendment constitute "special functions" necessitating a grant of absolute immunity. *See supra* notes 262–269 and accompanying text. Under such extraordinary and limited circumstances, it is possible that in a civil suit for money damages arising out of the Vice President's actions under the Twenty-Fifth Amendment, a court might grant the Vice President absolute immunity. *See supra* notes 262–269. For a discussion on the complexities and potential controversies involved in presidential inability decisions, see Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. (forthcoming Spring 2009).

[291] *See supra* notes 244–246 and accompanying text.

[292] *See Fitzgerald*, 457 U.S. at 751. In justifying absolute presidential immunity, the *Fitzgerald* Court observed, "Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise uniqie risks to the effective functioning of government." *Id.*

as it discounted as mere "dicta" the *Fitzgerald* Court's concern that participating in litigation would distract the President from his duties.[293] The Court's unease in *Fitzgerald* and *Clinton* that personal liability might divert the President's energies was not out of respect for the high office of the presidency, but was rather a concern that the public interest will not be served if the President's duties go unfulfilled.[294] In the case of the Vice President, historical precedent undermines the argument that a Vice President distracted by ongoing litigation prevents the effective functioning of the vice presidency.[295] The fact that both Vice President Aaron Burr and Vice President Spiro Agnew fulfilled their responsibilities as Vice President while confronting criminal charges suggests that the Vice President's duties under the Twenty-Fifth Amendment would not be greatly impaired by personal liability for money damages.[296] This reality seems particularly true given the less onerous nature of civil suits as opposed to criminal ones.[297]

The fact that the Vice President might accede to the presidency upon the President's removal from office, resignation, or death does not undermine the appropriateness of subjecting a Vice President to civil suit.[298] Were such an event to occur, any pending civil suits against the former Vice President would likely have to be tolled until the end of his presidency.[299] Upon accession to the presidency, the former Vice President would be the President, and as such should not be subject to suits for money damages resulting from official governmental acts.[300] It is true that the Court in *Clinton* asserted that the President could not claim absolute immunity for "unofficial conduct," but a President's prior official acts as Vice President would not constitute the type of "purely private acts" that the Court sought to remove from the realm of

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[293] *See Clinton*, 520 U.S. at 694 n.19. *But see id.* at 720 (Breyer, J., concurring in the judgment) (concluding that the *Fitzgerald* Court's grant of absolute immunity was based on both distortion and distraction concerns). It is possible, though, that with the benefit of hindsight, the Court might reconsider its position on the distracting nature of personal liability, given that the impeachment of President Bill Clinton in 1998 partly stemmed from the civil suit at issue in *Clinton*. Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 54 (1999).

[294] *See id.* at 720 (Breyer, J., concurring in the judgment); *Fitzgerald*, 457 U.S. at 751.

[295] *See supra* notes 196–218 and accompanying text.

[296] *See* Bork Memo, *supra* note 199, at 12–13.

[297] *See Clinton*, 520 U.S. at 705.

[298] *See* U.S. CONST. amend. XXV, § 1.

[299] *Cf.* Amar & Katyal, *supra* note 106, at 714–15 (arguing that civil suits against the President should toll until he or she leaves office).

[300] *See Clinton*, 520 U.S. at 694–95; *Fitzgerald*, 457 U.S. at 751.

presidential immunity.[301] Moreover, concern over transferring a Vice President's legal burden onto the President should in no way affect presidential succession or inability decisions.[302] This result would ultimately ensure that the Vice President's personal liability would not impair his or her constitutional duty as the President's designated successor, and it would maintain the holding in *Clinton* that the President is still subject to suits for damages for unofficial, private conduct.[303]

C. *The Vice President's Limited Legislative Functions May Justify a Narrow Claim for Legislative Immunity*

The Vice President might also claim a limited form of legislative immunity, particularly given the amorphous historical and constitutional role of the vice presidency.[304] Grounded in the Speech or Debate Clause of the U.S. Constitution,[305] legislative immunity is intended to protect the independent performance of legislative functions and to reinforce the separation of powers.[306] Although the Speech or Debate

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[301] *See* 520 U.S. at 694–96 (noting that although the President receives absolute immunity for his or her official acts, "[the President] is otherwise subject to the laws for his *purely private acts*") (emphasis added). Additionally, the President's prior conduct as Vice President would only receive temporary protection, as the President would be accountable for this earlier conduct upon leaving office.

[302] *See supra* note 290 and accompanying text.

[303] *See* 520 U.S. at 694–95. This narrow temporary immunity would only be applicable in the context of the Vice President's succession to the presidency under the Twenty-Fifth Amendment, not in the event that a former Vice President is elected as President. *See* U.S. CONST. amend. XXV. This approach is consistent with history, as Theodore Roosevelt and Harry Truman—both of whom *succeeded* to the presidency upon the President's death—had complaints against them dismissed *before* taking office. *See Clinton*, 520 U.S. at 692 & n.15 (citing DeVault v. Truman, 194 S.W.2d 29 (Mo. 1946) & People *ex rel.* Hurley v. Roosevelt, 71 N.E. 1137 (N.Y. 1904)). On the other hand, having been *elected* to the presidency, John F. Kennedy had to contest a civil complaint *after* taking office as President. *See id.* at 692 & n.16 (citing the complaints in *Bailey v. Kennedy*, No. 757,200 (Cal. Super. Ct. 1962) & *Hills v. Kennedy*, No. 757,201 (Cal. Super. Ct. 1962)).

[304] *See supra* notes 22–86 and accompanying text.

[305] U.S. CONST. art. I, § 6, cl. 1. The Speech or Debate Clause states, "[A]nd for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." *Id.* As a matter of tradition, the Vice President can only address the Senate with the unanimous consent of that body, but this is not compelled by the Constitution. *See* MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 13–14 (2004).

[306] *See* Gravel v. United States, 408 U.S. 606, 625 (1972) ("The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes . . . ."); United States v. Brewster, 408 U.S. 501, 512, 528 (1972) (noting that the Clause generally only reaches those things said or done in the session, but not "activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself"). Although the Vice President's claims for legislative immunity could not be supported on

Clause refers only to "Senators and Representatives," a court might reject a strict *expressio unius* reading of this clause and assert that as the President of the Senate, the Vice President can claim some limited legislative immunity.[307] Empowered by the Constitution to cast a tie-breaking vote, the Vice President ensures the functioning of the Senate at its most divided and contentious moments.[308] In addition, the lack of an explicit textual basis for the Vice President's legislative immunity claim would not necessarily be fatal, as both *Fitzgerald* and *Clinton* noted that neither judicial nor executive immunity has a "specific textual basis."[309] This potential expansion of legislative immunity would not be unprecedented, as the Court in 1998, in *Bogan v. Scott-Harris*, extended absolute legislative immunity to a city mayor for participating in the budget process, a "quintessentially legislative" function.[310] The willingness of the Court to blur the distinction between executive and legislative roles in *Bogan*, coupled with the Vice President's constitutional

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the grounds that the Legislative Branch must be protected from the Executive Branch, it is worth noting President Nixon's staff supported—and arguably facilitated—Vice President Agnew's resignation. *See* Freedman, *supra* note 197, at 10 n.8; *supra* notes 216–225 and accompanying text. Agnew's resignation avoided a judicial determination of whether a sitting President or Vice President had to be impeached before being criminally indicted. *See* Freedman, *supra* note 197, at 10 n.8.

[307] U.S. CONST. art. I, § 6, cl. 1; *see* Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 17 n.40 (1998) ("[T]he Vice President must obviously be immune from a libel suit for things he says in the Senate, even though he is not, strictly speaking, a Senator covered by the words of the Article I speech clause . . . ."); *see also* Amar & Katyal, *supra* note 106, at 713 (asserting that although the Vice President is not a "Senator or Representative," we should read the Constitution to extend the Arrest Clause to the Vice President). *But see* Albert, *supra* note 24, at 829 ("[T]he Constitution bars a Vice President from retreating to the constitutional protections expressly enumerated for legislators, meaning, for instance, that she may not brandish the congressional speech privilege clause as a shield to civil actions brought against her for libel.").

[308] *See* U.S. CONST. art. I, § 3, cl. 4; *see also supra* notes 42–44 and accompanying text. Given that the Vice President represents a national constituency and casts the crucial vote on the most divisive issues in the Senate, it would seem anomalous that the Vice President would be the only person voting in the Senate to be subject to arrest on the way to vote and liable for statements made on the Senate floor during the vote itself. *See* Amar, *supra* note 307, at 17 n.40; Amar & Katyal, *supra* note 106, at 713.

[309] *See Clinton*, 520 U.S. at 719 (Breyer, J., concurring in the judgment); *Fitzgerald*, 457 U.S. at 750 n.31.

[310] 523 U.S. 44, 55 (1998). Although the Court attempted to downplay the significance of its ruling by noting that state and local legislators have long been granted absolute legislative immunity, its extension of legislative immunity to an executive official is quite significant. *See id.* at 49; *see also* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 404–05 (1979) (granting local legislators absolute legislative immunity); Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (granting state legislators absolute legislative immunity).

function as President of the Senate, suggests that a grant of limited legislative immunity might not be as farfetched as originally presumed.[311]

If a court is willing to consider the Vice President's claim of legislative immunity, it must recognize that such a grant of immunity should be narrowly tailored to reflect the Vice President's limited legislative function.[312] The Vice President could likely only claim immunity from suits stemming from a speech given of the floor of the Senate or from inquiries seeking evidence of the Vice President's "legislative action" in casting a tie-breaking vote.[313] The Vice President's ability to invoke immunity for participating in the "deliberative process" would be greatly constrained by the fact that the Senate must grant permission before the Vice President can even speak in the Senate and that statements disseminated to the public outside the immediate context of the Senate are not protected.[314] Concern over the Vice President's use—and potential misuse—of immunity to exclude evidence of his or her legislative actions is somewhat justified, but the Court in *United States v. Helstoski* was clear that only specific references to past legislative acts are protected, leaving the bulk of such evidence admissible.[315] Moreover, the infrequency with which the Vice President actually casts a tie-breaking vote in the Senate provides further reassurances that the Vice President could not abuse the limited protections provided by this immunity.[316] This limited form of legislative immunity thus requires the

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[311] *See* 523 U.S. at 55; Amar, *supra* note 307, at 17 n.40.

[312] *See supra* notes 41–43 and accompanying text.

[313] *See* Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979); United States v. Helstoski, 442 U.S. 477, 489 (1979) ("[The Speech or Debate Clause] 'precludes any showing of how [a legislator] acted, voted, or decided.'" (quoting *Brewster*, 408 U.S. at 527)).

[314] *See Proxmire*, 443 U.S. at 127, 130; *supra* note 308. Senators are given additional protection as part of the deliberative process involved in committee hearings and reports, but the Vice President could not make comparable claims because he or she is not granted any role in committee proceedings. *See* Doe v. McMillan, 412 U.S. 306 (1973); U.S. SENATE, RIDDICK'S SENATE PROCEDURE, S. DOC. 101-28, at 382–429 (1992), *available at* http://www.gpoaccess.gov/riddick/382–429.pdf.

[315] *See* 442 U.S. at 489 & n.7. Presumably, a court could review *in camera* evidence that the Vice President asserts is protected by the Speech or Debate Clause to determine if it in fact specifically refers to past legislative acts. *See id.* The Court has also clearly asserted that attempting to influence executive agencies does not constitute legislative activity, thus denying the Vice President the ability to construe his or her executive duties as legislative actions. *See Proxmire*, 443 U.S. at 121 n.10, 131 (noting that efforts to influence executive agencies are not legislative activity); United States v. Johnson, 383 U.S. 169, 172 (1966) (asserting that attempts to influence the Department of Justice are not legislative activity).

[316] *See* SENATE HISTORICAL OFFICE, OCCASIONS WHEN VICE PRESIDENTS HAVE VOTED TO BREAK TIES IN THE SENATE (2008), http://www.senate.gov/artandhistory/history/resources/pdf/VPTies.pdf. Vice President Cheney cast a tie-breaking vote only eight times in his eight years as Vice President. *See id.* at 8.

Vice President to take explicit legislative action; it does not grant protection simply by virtue of the Vice President's constitutional status as President of the Senate.[317] Given the Vice President's minimal legislative role and the substantial constraints under which the Vice President could invoke legislative immunity, the Speech or Debate Clause is likely to provide the Vice President with little—if any—protection in civil suits for damages.[318]

CONCLUSION

The vice presidency remains a unique constitutional and political office, but neither the Vice President's specific functions nor his constitutional status merit a grant of absolute immunity in civil suits for damages. Despite the Vice President's hybrid status under Articles I and II of the U.S. Constitution, the Vice President's claims for immunity must be analyzed within the Court's executive immunity jurisprudence. Not only did the Court firmly locate the Vice President within the executive branch in *Cheney v. U.S. District Court for the District of Columbia*, but the Vice President's potential claims for legislative immunity are also so limited as to not afford him any real protection. The Vice President would ultimately find little room within the Court's executive immunity jurisprudence to argue that the Vice President should be granted absolute immunity. Given that Article II vests no executive power in the Vice President and that separation of powers concerns have not precluded courts from imposing criminal liability on sitting Vice Presidents in the past, there are no real constitutional concerns that mandate a grant of absolute immunity to the Vice President. Likewise, the Vice President's limited advisory functions within the executive branch make the Vice President no different than any other presidential aide or Cabinet official, all of whom have been denied absolute immunity.

The question of immunity from civil suits for damages is only one part of a much larger discussion on executive power and legal accountability. The issue of vice presidential immunity, though, reveals a great deal about the actual power and nature of the vice presidency. Vice President Cheney transformed the office of the Vice President in many ways, but he was unable to alter the reality that the constitutional concerns and ideals embodied in the presidency are simply not applicable to the vice presidency. Immunity from civil suit for damages always represents a significant and difficult determination by courts that pro-

[317] *See supra* notes 313–316 and accompanying text.

[318] *See supra* notes 313–316 and accompanying text.

tecting some officials in the exercise of their duties best serves the public interest. Holding the Vice President liable for civil damages would serve the public interest by sending a powerful message about the rule of law and the limits of executive power, while still preserving the effective functioning of the executive branch.

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